H.R. 1255, THE PRESIDENTIAL RECORDS ACT OF 1978: A REVIEW OF EXECUTIVE BRANCH IMPLEMENTATION AND COMPLIANCE

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 1255

TO AMEND CHAPTER 22 OF TITLE 44, UNITED STATES CODE, POPULARLY KNOWN AS THE PRESIDENTIAL RECORDS ACT, TO ESTABLISH PROCEDURES FOR THE CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE OF PRESIDENTIAL RECORDS

MARCH 1, 2007

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H.R. 1255, THE PRESIDENTIAL RECORDS ACT OF 1978: A REVIEW OF EXECUTIVE BRANCH IMPLEMENTATION AND COMPLIANCE

THURSDAY, MARCH 1, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m. in room 2154, Rayburn House Office Building, Hon. Wm. Lacy Clay (chairman of the subcommittee) presiding.

Present: Representatives Clay, Waxman, Yarmuth, Turner, and Sali.

Staff present: Tony Haywood, staff director; Alissa Bonner, Adam C. Bordes, and Anna Laitin, professional staff members; Jean Gosa, clerk; Nidia Salazar, staff assistant; Leneal Scott, information systems manager; Molly Gulland, assistant communications director; Steve Castor and Charles Phillips, minority counsels; Allyson Blandford, minority professional staff member; John Cuaderes, minority senior investigator and policy advisor; Patrick Lyden, minority parliamentarian and member services coordinator; and Brian McNicoll, minority communications director.

Mr. CLAY. The Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform will now come to order. Today's hearing will examine issues relating to the Presidential Records Act of 1978, the role of the National Archives in administering the act, and the effect of Executive Order 13233, an order issued by President Bush to give former Presidents greater control over the disposition of their White House records.

Without objection, the Chair and ranking minority member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other Member who seeks recognition.

Without objection, Members and witnesses may have 5 legislative days to submit a written statement or extraneous materials for the record.

Let me welcome all of you here today on the Presidential Records Act of 1978 and issues relating to its implementation. Presidential records serve as a vital resource for the researchers and historians who document our Nation's history. These documents provide in-

sight into how and why critical decisions are made at the highest level of our democratic government.

Access to Presidential records ensures greater government transparency and accountability. In addition, access to Presidential records allows historians to develop a complete chronology of the events and circumstances that shape and define a Presidency. With the perspective these documents provide, policymakers and the public can learn important lessons from past successes and mistakes as we confront new challenges facing our great Nation.

Congress has recognized the importance of Presidential records by establishing a federally supported system of Presidential libraries, which serve as a depository for a former Presidents' records and correspondence. Following the Watergate scandal, the need to establish stronger controls and transparency over Presidential records became clear, and the Presidential Records Act of 1978 was enacted. The PRA gave definition to the term "Presidential records" and officially made these records Federal property once the incumbent President leaves office. The act also established appropriate protections to ensure that sensitive or classified information would not be released to the public.

In 2001, President Bush issued Executive Order 13233, which established new restrictions on access to Presidential records. Specifically, the order granted former Presidents and their appointees veto authority over the release of records containing confidential advice and deliberations among advisers. Such restrictions provide former Presidents indefinite control over many records that addressed important strategic and planning decisions. As such, they directly undermine the purpose of disclosure that animates the PRA.

I am proud to say that I am an original cosponsor of legislation introduced today by full Committee Chairman Henry Waxman, who has joined us today, that would rescind Executive Order 13233. I am happy that Chairman Waxman is participating with us today as ex officio member of the subcommittee. I thank him for his leadership on this important issue.

The Presidential Records Act Amendments of 2007 has bipartisan support with Representatives Duncan and Platts, joining us as original cosponsors. I look forward to working with my colleagues on both sides of the aisle to move this legislation forward in the coming weeks, and I sincerely hope that we will have a meaningful and constructive dialog with the Bush administration along the way.

I think that today's hearing will make it clear that rescinding Executive Order 13233 is clearly in the public interest.

We will have two panels today. I want to thank all of the witnesses for appearing today and for your testimony.

I will yield to my colleague from Ohio, Mr. Turner.

[The text of H.R. 1255 follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 1255

To amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records.

IN THE HOUSE OF REPRESENTATIVES

MARCH 1, 2007

Mr. WAXMAN (for himself, Mr. PLATTS, Mr. CLAY, and Mr. BURTON of Indiana) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

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A BILL

To amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Presidential Records Act Amendments of 2007".

SEC. 2. PROCEDURES FOR CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE.

(a) IN GENERAL.—Chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"§ 2208. Claims of constitutionally based privilege against disclosure

"(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

"(A) promptly provide notice of such determination to—

"(i) the former President during whose term of office the record was created; and

"(ii) the incumbent President; and

"(B) make the notice available to the public.

"(2) The notice under paragraph (1)—

"(A) shall be in writing; and

"(B) shall include such information as may be prescribed in regulations issued by the Archivist.

"(3)(A) Upon the expiration of the 20-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the

public the record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

"(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 20 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

"(C) Notwithstanding subparagraphs (A) and (B), if the period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire after January 19 and before July 20 of the year in which the incumbent President first takes office, then such period or extension, respectively, shall expire on July 20 of that year.

"(b)(1) For purposes of this section, any claim of constitutionally based privilege against disclosure must be asserted personally by a former President or the incumbent President, as applicable.

"(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and

Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under paragraph (1).

"(c)(1) The Archivist shall not make publicly available a Presidential record that is subject to a privilege claim asserted by a former President until the expiration of the 20-day period (excluding Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist is notified of the claim.

"(2) Upon the expiration of such period the Archivist shall make the record publicly available unless otherwise directed by a court order in an action initiated by the former President under section 2204(e).

"(d)(1) The Archivist shall not make publicly available a Presidential record that is subject to a privilege claim asserted by the incumbent President unless—

"(A) the incumbent President withdraws the privilege claim; or

"(B) the Archivist is otherwise directed by a final court order that is not subject to appeal.

"(2) This subsection shall not apply with respect to any Presidential record required to be made available under section 2205(2)(A) or (C).

"(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.".

(b) CONFORMING AMENDMENTS.—(1) Section 2204(d) of title 44, United States Code, is amended by inserting ", except section 2208," after "chapter".

(2) Section 2207 of title 44, United States Code, is amended in the second sentence by inserting ", except section 2208," after "chapter".

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"2208. Claims of constitutionally based privilege against disclosure.".

SEC. 3. EXECUTIVE ORDER OF NOVEMBER 1, 2001.

Executive Order number 13233, dated November 1, 2001 (66 Fed. Reg. 56025), shall have no force or effect.

○

Mr. TURNER. Thank you, Mr. Chairman. I appreciate you holding this hearing today.

The Presidential Records Act, originally passed in 1978, sets forth policies for Presidential records and how those records should be made available to the public. The act gave custody of a former President's records to the Archivist of the United States. It imposed upon the Archivist the duty to make sure records available to the public are available as quickly and completely as possible under the law.

More importantly, however, it established that the official records of a former President belong to the American people. The act built in safeguards over the disclosure of Presidential records, allowing former Presidents to restrict disclosure of certain confidential records for a period of time after they leave office. The act also permanently shielded from public release records containing military and diplomatic secrets or other categories of information whose disclosure would not be in the national interest.

It is important that we distinguish the Nation's interest from a former President's interest, as we do not want to expand the scope of Executive privilege to mean a President can simply withhold approval for release and public disclosure of records indefinitely. As the chairman has noted clearly, educators, researchers, historians and the public should have access to these documents under the direction and care of the Archivist. These records are a tremendous resource for all of those who have access to them.

As we have seen, however, gaining this access can take years after a Presidency has ended. According to some commentators, Executive Order 13233 shifted the burdens and responsibilities established by the act. We need to determine whether the balance between a President's constitutional privilege and the public's right to know has been tipped beyond Congress's intent. I hope today's hearing will draw on and buildupon the work this committee has previously done, specifically the efforts of our colleague, Mr. Burton, in the 107th Congress. I am confident that we can find a way to preserve and protect the constitutional prerogatives of Presidents, while preserving the act's intent of publicly disclosing Presidential records as promptly and completely as possible.

I want to thank our witnesses and I look forward to hearing their testimony.

Mr. CLAY. I thank the gentleman from Ohio for his opening statement.

I now yield to the gentleman from California, the distinguished chairman of the full committee on Oversight and Government Reform, Mr. Waxman.

Chairman WAXMAN. Thank you very much, Chairman Clay, for holding today's hearing and for your strong leadership in trying to make sure that we have an open government.

Today, we are considering one of the Nation's most important open government laws, the Presidential Records Act. This vital law is supposed to make Presidential records available to historians and the public 12 years after the end of a Presidential administration. Unfortunately, President Bush issued an Executive order in 2001 that carved enormous loopholes in the Presidential Records Act.

The Executive order gave unprecedented authority to former Presidents and their heirs to withhold documents from the public. It allowed current and former Presidents to indefinitely delay the release of any records. And for the first time, it gave former Vice Presidents authority to assert Executive privilege. Taken together, the changes turned the Presidential Records Act into the "Presidential Secrecy Act."

Today, I am introducing legislation with you, Chairman Clay and Representatives Platts and Burton, to nullify this misguided Executive order. The Presidential Records Act Amendments of 2007 restore many of the procedures established under the old Executive order issued by President Reagan. It would make clear that Executive privilege is personal to Presidents and former Presidents, and it would set firm deadlines for current and former Presidents to review records before they are released to the public.

This legislation not only has bipartisan sponsors, but it has bipartisan roots. In 2002, Representative Steve Horn introduced a similar bill that had widespread support.

History is not partisan. Historians and scholars need access to our Nation's history as it happened, not as a former President wished that it had happened. President Gerald Ford once said, "I firmly believe that Presidential papers, except for the most highly sensitive documents involving our national security, should be made available to the public," and that is exactly the sentiment that motivates the legislation we will be considering today.

I look forward to hearing the testimony of today's witnesses, and again I thank you for calling this hearing.

Mr. CLAY. Thank you so much, Chairman Waxman, for that opening statement.

I now yield to the gentleman from Kentucky, Mr. Yarmuth.

Mr. YARMUTH. Thank you, Mr. Chairman. I want to congratulate the bipartisan leadership of the committee in organizing these hearings. It is a very important topic. As a former journalist, it is one that I am particularly interested in.

I will say that this is the type of issue that motivated me in seeking membership on this committee and this subcommittee, along with the integrity and courage and charm of the chairman.

I look forward to hearing the testimony and doing some important work on behalf of transparency in government for the American people.

I yield my time.

Mr. CLAY. Thank you so much for that opening statement, Mr. Yarmuth.

If there are no additional opening statements, the subcommittee will now receive testimony from the witnesses before us today. I want to start by introducing our first panel. Dr. Allen Weinstein, Archivist of the United States, leads the National Archives and Records Administration. Welcome. And Dr. Harold Relyea is a specialist in American National Government with the Congressional Research Service of the Library of Congress. Also we have Ms. Sharon Fawcett, who is here with us, and we want to welcome you, too. We thank all three of you all for appearing today.

It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify. Please rise and raise your right hands.

[Witnesses sworn.]

Mr. CLAY. Let the record reflect that the witnesses answered in the affirmative. Thank you.

I ask that each of the witnesses now give a brief summary of their testimony and to keep the summary under 5 minutes in duration. Bear in mind your complete written statement will be introduced in the hearing record. Also bear in mind that we expect to be interrupted very shortly by votes on the House floor.

So Dr. Weinstein, please, let's begin.

STATEMENTS OF ALLEN WEINSTEIN, ARCHIVIST OF THE UNITED STATES, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; HAROLD RELYEA, SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RECORDS SERVICE; AND SHARON FAWCETT, ASSISTANT ARCHIVIST FOR PRESIDENTIAL LIBRARIES

STATEMENT OF ALLEN WEINSTEIN

Mr. WEINSTEIN. Thank you, Chairman Clay, Congressman Turner, members of the subcommittee and subcommittee staff. I am Allen Weinstein, Archivist of the United States. I want to thank all of you for the opportunity to testify this afternoon on the implementation of the Presidential Records Act of 1978, PRA, under Executive Order 13233.

I particularly want to thank you all for your continued interest in the programs and responsibilities of the National Archives and Records Administration, which we call NARA. Five years ago, shortly after Executive Order 13233 was promulgated, my predecessor, John Carlin, appeared before this subcommittee as then comprised to provide historical background on the PRA and how NARA had worked to implement public access to Presidential records. Since that time, NARA has had extensive experience under the Executive order, and there has also been much public discussion about it.

Today, Mr. Chairman, I would like to update the subcommittee on NARA's experience in working with the PRA and Executive Order 13233. I have submitted for the record a more extensive written paper.

Since the enactment of PRA, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The PRA also applies to all of the Vice Presidential records in the same manner as Presidential records, and affords the former Vice Presidents the same authority as the former Presidents.

The PRA established government control over Presidential records that Presidents have donated to the National Archives, dating back to President Hoover. The PRA mandates, "that the Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible, consistent with the provisions of this act." As noted during floor debate in 1978, among other things, the PRA represents an effort to legislate, as

one member put it, "a careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by the President and his staff during the course of their White House activities."

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, Presidential papers and materials maintained under NARA's oversight at the Presidential libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter had been controlled by the terms of the deeds of gifts, by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. NARA processed and opened Presidential materials based on the deeds and professional archival considerations.

Moreover, because the materials at these libraries were donated to the United States, they are not subject to requests under the Freedom of Information Act [FOIA], or any other public access statute. In contrast, because the PRA subjects all Presidential records to public access through FOIA 5 years after the end of an administration, PRA libraries practice open records almost exclusively in response to FOIA requests and mandatory declassification review requests under Executive Order 12958 on classified national security information, and have less opportunity to conduct systematic processing of records.

President Bush issued Executive Order 13233 in November 2001. As the subcommittee is aware, Executive Order 13233 replaced Executive Order 12667, which was issued by President Reagan and under which NARA operated for the first 12 years that we processed and opened Presidential records under the PRA. Some researchers have raised concerns that Executive Order 13233 would fundamentally alter the process for requesting and opening Presidential records and would result in a significant withholding of records.

The most important measure in evaluating Executive Order 13233 is, of course, whether Presidential records are being made available to the public. In that regard, I can report to you that since Executive Order 13233 went into effect in November 2001, NARA has opened over 2.1 million pages of Presidential records. During that time, there has been only one occasion when Presidential records were kept closed from the public by an assertion of Executive privilege under the order, which occurred in 2004, for a total of 64 pages of records from the Reagan Library, out of which 30 were duplicate copies.

There should be no question that to date Executive Order 13233 has not been used by former Presidents or the incumbent to prevent opening records to the public, which does not mean, Mr. Chairman, that I do not think there are legitimate concerns over the Executive order, and I look forward to listening to my friends and colleagues as they discuss their views on this later this afternoon.

Just a few more comments, and I will be through, Mr. Chairman.

Executive Order 13233 also has added to the endemic problem of delay that NARA faces from the PRA and the processing of Presidential records. At the three Presidential libraries that operate under the PRA—Reagan, George H.W. Bush, and Clinton—NARA has FOIA backlogs that extend up to 5 years. These queues are the direct result of the Archivist at each library contending with an ever-increasing volume and demand for Presidential records, but not an expansion of the number of Archivists.

Once NARA completes the search and review of a FOIA request, we then must provide notice to the representatives of the former and incumbent Presidents under Executive Order 13233 for their review. The average combined time for the representatives to complete the reviews is currently approximately 210 days.

Finally, Mr. Chairman, a personal word, to encourage dialog on these issues between you and your colleagues in the Congress and the administration—a discussion of whatever changes one would care to make in the Executive order, it seems to me that this is a moment for dialog and perhaps a moment for returning to the original concerns and values of the founders of the Presidential Library System.

So I will end with a quote, which was Franklin Roosevelt's comment on the dedication of the first Presidential library on June 30, 1941, in which he said the following: "The dedication of a Presidential library," said President Roosevelt, "is itself an act of faith. To bring together the records of the past and house them in buildings where they will be preserved for the use of men and women living in the future, a nation must believe in three things. It must believe in the past. It must believe in the present. But most of all, it must believe in the capacity of its people so to learn from the past that they can gain in judgment for the creation of the future."

Thank you, Mr. Chairman. Thank you, members of the committee. I am happy to answer any questions.

[The prepared statement of Mr. Weinstein follows:]

STATEMENT
by Allen Weinstein
Archivist of the United States

to the
Subcommittee on Information Policy, Census, and National Archives
of the Committee on Government Oversight and Reform
House of Representatives
Congress of the United States

On the Implementation and Effectiveness of the Presidential Records Act of 1978

March 1, 2007

Chairman Clay, Congressman Turner, members of the Subcommittee, and Subcommittee staff, I am Allen Weinstein, Archivist of the United States, and I want to thank you for the opportunity to appear before you this morning on the implementation of the Presidential Records Act of 1978 (PRA) under Executive Order 13233. Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration (NARA). We are fully aware that under the jurisdiction of this subcommittee, attention to NARA is your job. However, during your career in Congress, you have taken a particular interest in our mission. The people of NARA and our many constituent groups thank you for that interest.

Five years ago, shortly after E.O. 13233 was promulgated, my predecessor, John Carlin, appeared before this Subcommittee as then comprised. Governor Carlin provided historical background on the PRA and how NARA had worked to implement public access to Presidential records. Since that time, NARA has had extensive experience under the order, and there has also been much public discussion about it. Today I would like to update the Subcommittee on

NARA's experience in working with the PRA and E.O. 13233, and I would also like to clarify some of the concerns that have arisen. For further background on this issue, let me recommend to the Subcommittee an article that two of my senior staff members published last summer in *The Public Historian*, entitled "A Historical Review of Access to Records in Presidential Libraries," by Nancy Kegan Smith and Gary M. Stern. A copy of the article is attached to this testimony, and I request that it be included in the record of this hearing.

Background on the Presidential Records Act

Since the enactment of the PRA, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The PRA also applies to all Vice-Presidential records in same manner as Presidential records, and affords the former Vice-Presidents the same authority as the former Presidents.

The PRA established Government control over Presidential records while codifying and preserving some of the basic practices that long existed with respect to the papers that Presidents had donated to the National Archives (dating back to President Hoover). The PRA mandates that "[t]he Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." 44 U.S.C. § 2203(f)(1). As noted during the floor debate in 1978, among other places, the PRA represents an effort to legislate a "careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by the President and his staff during the course of their White House activities." Floor Statement of Congressman Thompson, *Cong. Rec.*, Oct. 10, 1978, at 34897.

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, the Presidential papers and materials maintained under NARA's oversight at the Presidential Libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter are controlled by the terms of the deeds of gift by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. NARA processed and opened Presidential materials based on the deeds and professional archival considerations. Moreover, because the materials at these Libraries were donated to the United States, they are not subject to request under the Freedom of Information Act (FOIA) or any other public access statute. This meant that the Library staff were able to process and open most records in an organized and systematic way based on how the records were filed or arranged. Such "systematic processing" is generally much more efficient and less time consuming than processing in response to FOIA requests. However, researchers have no legal recourse to challenge the withholding of records or delays in responding to requests.

In contrast, because the PRA subjects all Presidential records to public access through the FOIA five years after the end of the Administration, PRA Libraries in practice open records almost exclusively in response to FOIA requests (or mandatory declassification review requests under Executive Order 12958 on Classified National Security Information), and have less opportunity to conduct systematic processing of records.

During the first twelve years after the end of an Administration, the PRA allows the President to assert six Presidential restrictions. Four of the six presidential restrictions are identical to corresponding FOIA exemptions: exemptions 1, for classified national security information; exemptions 3, for information protected by other statute; exemptions 4, for trade secrets and confidential business information; and exemptions 6, for unwarranted invasions of personal privacy. Presidential exemption 2 ("P2"), for "appointments to Federal office," has no FOIA counterpart, but is subsumed, in large part, under FOIA exemption (b)(6). Presidential exemption 5 ("P5"), concerning "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," is similar to FOIA exemption (b)(5), and protects the disclosure of presidential communications, deliberations, and other information that could be subject to a common law or constitutionally-based privilege.

Once the Presidential restrictions expire after twelve years, the PRA establishes that only eight of the nine FOIA exemptions shall apply to Presidential records. Congress specifically excluded Presidential records from the FOIA (b)(5) exemption, which applies to records subject to the Executive privilege, deliberative process privilege, and other recognized privileges. Accordingly, after twelve years, there is no *statutory* basis to withhold records that might be subject to a constitutionally based privilege.

Executive Order 13233

President Bush issued Executive Order 13233 in November 2001 "to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges." As the Subcommittee is aware, E.O. 13233 replaced

Executive Order 12667, which was issued by President Reagan and under which NARA operated for the first twelve years that we processed and opened Presidential records under the PRA. Some researchers have raised concerns that E.O. 13233 would fundamentally alter the process for requesting and opening Presidential Records and would result in a significant withholding of records.

The most important measure in evaluating E.O. 13233 is whether Presidential records are being made available to the public. In that regard, I can report to you that, since E.O. 13233 went into effect in November 2001, NARA has opened over 2.1 million pages of Presidential records. During this time, there has been only one occasion when Presidential records were kept closed from the public by an assertion of Executive privilege under the order, which occurred in 2004 for a total of 64 pages of records from the Reagan Library (out of which 30 pages were duplicate copies). Thus, there should be no question that, to date, E.O. 13233 has not been used by former Presidents or the incumbent President to prevent the opening of records to the public.

I thought it might also be useful to describe the major practical differences and similarities between the two orders (some of this discussion also appears in *The Public Historian* article mentioned above):

- Under E.O. 13233, like E.O. 12667, an incumbent President can assert privilege and require NARA to withhold records even if a former President supported disclosure of the records. This is consistent with the President's authority to assert privilege over all other Executive branch records.

- Also, under E.O. 13233, like E.O. 12667, records can be withheld based on a claim of privilege solely by a former President, even if the incumbent President does not support the withholding.

- Unlike E.O. 12667, E.O. 13233 requires NARA to honor any assertion of privilege by a former President, even if the incumbent President does not concur, thus eliminating the possibility that the Archivist could decide not to honor a unilateral claim of privilege by a former President. However, this situation never, in fact, occurred under E.O. 12667.

- E.O. 12667 established a concurrent 30 day review period for both former and incumbent Presidents, after which NARA could open the records unless specifically informed not to do so. E.O. 13233 established a 90-day review period for the former President, followed by a non-durational review period for the incumbent President; NARA cannot open the records until specifically informed to do so.

Perhaps the most common misunderstanding that some NARA stakeholders have raised about E.O. 13233 is the view that the order creates *new* authority for the incumbent President to assert privilege over records even when a former President wants them released. In reality, this authority has long existed, regardless of the E.O., because the PRA itself established that Presidential records are owned by the government and therefore subject to the ultimate legal control of the current Administration. This authority to exercise control over government records is no different from the current Administration's authority to control access to federal

agency records that were created during a prior Administration. In addition, the Supreme Court recognized in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), that a former President may assert executive privilege even when the incumbent President wants them released. In this regard, E.O. 13233 differs from its predecessor E.O. 12667, in that the Archivist no longer has discretion to reject a former President's privilege assertion in the hypothetical situation when the incumbent President takes no position on whether to withhold the records.

Some NARA stakeholders have also interpreted the sentence in section 2(c) of the order, which describes the "demonstrated, specific need" standard for overcoming a constitutionally based privilege, as establishing a limitation on researchers' ability even to request Presidential records. In fact, researchers do not have to provide NARA with a "specific need" when requesting any Presidential records. Rather, they would only have to demonstrate such a need when appealing or litigating against a decision to withhold Presidential records under an actual assertion of a constitutionally based privilege by the former or incumbent President, a situation that, as noted above, has happened only once to date.

This was the standard that the U.S. District Court applied in rejecting a challenge to the formal assertion of executive privilege in the *American Historical Association v. NARA* lawsuit. 402 F.Supp.2d 171 (D.D.C. 2005). The AHA and other researchers filed a lawsuit in the U.S. District Court for the District of Columbia against NARA in December 2001 challenging a number of provisions in E.O. 13233 as well as the privilege assertion over the 64 withheld pages. Over five years later, the portion of the case challenging the E.O. itself is still pending.

Executive Order 13233 has added to the endemic problem of delay that NARA faces from the PRA in the processing of Presidential records. At the three Presidential Libraries that operate under the PRA – Reagan, George H.W. Bush, and Clinton – NARA has FOIA backlogs that extend up to five years. These queues are the direct result of the archivists at each Library contending with an ever increasing volume of and demand for Presidential records.

Once NARA completes the search and review of a FOIA request, we then must provide notice to the representatives of the former and incumbent Presidents under E.O. 13233 for their review. The average combined time for the representatives to complete their reviews is currently approximately 210 days. In October 2005, NARA reported to the court in *AHA v. NARA* that the average time was approximately 170 days. In April 2004, NARA reported to the court that the average time was approximately 90 days.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.

Mr. YARMUTH [presiding]. Thank you for your statement, Mr. Weinstein.

Dr. Relyea, welcome.

STATEMENT OF HAROLD RELYEA

Mr. RELYEA. Mr. Chairman and members of the subcommittee, thank you for your invitation to appear here today. I am Harold Relyea, a Specialist in American National Government——

Mr. YARMUTH. Can you turn your mic on, Doctor?

Mr. RELYEA. It is.

I am Harold Relyea, a Specialist in American National Government with the Congressional Research Service of the Library of Congress.

During the initial years of the Federal Government, departing Presidents had little choice with regard to the disposition of their records. There was no national archive to receive such papers, and for reasons of etiquette or politics or both, there was a reluctance to leave them behind. Thus, the early chief executives carried away their documents of office, entrusting them to their families, estate executors, and often to fate.

President Franklin Roosevelt sought to return Presidential papers to the public realm through a new type of institution, the federally maintained Presidential library, the first of which was constructed with private funds on the grounds of his family home in Hyde Park, NY. Chartering legislation for the Roosevelt Presidential Library was enacted in 1939, and the completed facility was accepted for Federal maintenance on July 4, 1940. With the later enactment of the Presidential Libraries Act of 1955, basic policy was set for the creation of subsequent federally maintained Presidential libraries.

About two decades later, as a consequence of the so-called Watergate incident and related matters, the official papers and records of President Richard M. Nixon were placed under Federal custody by the Presidential Recordings and Materials Preservation Act of 1974, to assure their availability to Federal prosecutors. Following the enactment of this statute, Congress developed the law we are talking about today, the Presidential Records Act of 1978, which defined Presidential records and, for all such materials created on or after January 20, 1981, effectively made them Federal property that was to remain under the custody and control of the Archivist when each President left the White House.

Prior to the conclusion of his term of office, the departing President was authorized to specify durations not to exceed 12 years for which access to certain specified categories of information would be restricted. After the expiration of these periods of restriction, the records of the former President would be protected by exemptions to the rules of disclosure specified in the Freedom of Information Act.

A former President was to be notified by the Archivist when records were about to be disclosed, particularly, in the words of the statute, "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have."

The statute also stated, "Nothing in this act may be construed to confirm, limit or expand any constitutionally based privilege which may be available to an incumbent or former President." This provision addressed the so-called Executive privilege, or the exercise of a claim of constitutionally based privilege by the Executive against the disclosure of Presidential records.

Jimmy Carter was the last occupant of the Oval Office who could truly take away his records and papers. His successor, Ronald Reagan, in the closing days of his second term as President, issued an Executive order of January 18, 1989, requiring the Archivist to notify the incumbent President and former Presidents whose papers were involved, of his intent to disclose publicly Presidential records which were not otherwise subject to protection under the terms of the Presidential Records Act. The Archivist was to identify any specific materials in the records to be disclosed which may raise a substantial question of Executive privilege. As defined in the order, a substantial question of Executive privilege existed if the disclosure of Presidential records might impair the national security, law enforcement, or the deliberative processes of the executive branch.

The first incumbent President to exercise this authority was George W. Bush. The Reagan order, as we heard, was subsequently revoked by Executive Order 13233 of November 1, 2001, which many regarded as providing a more expansive basis for the exercise of Executive privilege. Opposition to Executive Order 13233 was expressed by historians, political scientists, journalists, and lawyers, among others. On November 15, 2001, for example, the New York Times editorially commented that the order, "essentially ditches the law's presumption of public access in favor of a process that grants either an incumbent President or a former President the right to withhold the former President's papers from the public," and concluded that "if a remedy for the situation was to be realized, Congress must pass a law doing so."

A bill, H.R. 4187, to overturn the order, was introduced in the House on April 11, 2002, by Representative Steven Horn for himself and 22 bipartisan cosponsors. It also amended the Presidential Records Act to provide for the exercise of Executive privilege in terms more limited than those of Executive Order 13233.

A subcommittee under the chairmanship of Representative Horn held hearings on the Executive order and H.R. 4187, and the Committee on Government Reform held a hearing on the impact of the Executive order on the public availability of Presidential records. Summarizing these proceedings, the subsequent report accompanying H.R. 4187 stated, "Witnesses at these three hearings included historians, lawyers, and other experts who testified that Executive Order 13233 violated the Presidential Records Act and greatly inhibited the release of Presidential records as envisioned by the act."

The measure, with an amendment, was favorably reported from the committee on November 22, 2002, but did not receive a floor vote prior to the adjournment of the 107th Congress. Representative Horn did not stand for reelection to the next Congress, and no successor legislation was subsequently introduced in either House during the 108th or 109th Congresses.

Today, in the course of examining executive branch implementation of and compliance with the Presidential Records Act, this subcommittee has before it the question of the need for such legislation.

Thank you for your attention. I welcome your questions.

[The prepared statement of Mr. Relyea follows:]

STATEMENT BY HAROLD C. RELYEA
CONGRESSIONAL RESEARCH SERVICE
BEFORE
HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON INFORMATION POLICY,
CENSUS, AND NATIONAL ARCHIVES
MARCH 1, 2007
THE PRESIDENTIAL RECORDS ACT OF 1978:
A REVIEW OF EXECUTIVE BRANCH IMPLEMENTATION
AND COMPLIANCE

Mr. Chairman and members of the Subcommittee, thank you for your invitation to appear here today to offer testimony regarding the subject matter of this hearing, executive branch implementation of, and compliance with, the Presidential Records Act of 1978. I am Harold C. Relyea, a Specialist in American National Government with the Congressional Research Service of the Library of Congress.

Tradition established. During the first 150 years of the federal government, the management and preservation of federal records was generally neglected.[1] Inattentiveness to the maintenance of official papers prevailed within both the infant bureaucracy and the White House. While the Secretary of State bore responsibility for retaining copies of the most important government documents during these initial years, lesser papers without immediate administrative significance disappeared in a clutter, disintegrated, became otherwise lost, or were destroyed by design.

In this atmosphere, departing Presidents had little choice with regard to the disposition of their records: there was no national archive to receive such papers, and, for reasons of etiquette, or politics, or both, there was reluctance to leave them behind. Thus, the early Chief Executives carried away their documents of office, entrusting them to their family, estate executors, and, often, to fate. After several decades of the perils of private ownership, many collections of presidential records

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[1] See H. G. Jones, *The Records of a Nation* (New York: Atheneum, 1969), pp. 3-23.

came to be established within the libraries of state and private universities, state historical societies, and the Library of Congress. However, time levied a price on some caches of such documents before they came to rest in friendly institutions.

As the federal establishment began to grow and to realize increasing responsibility for maintaining or regulating the economic and social affairs of the nation, questions arose about the propriety and wisdom of neglecting the management and preservation of federal records, including the practice of regarding presidential papers as personal property to be taken away by the incumbent when he left office. By the 20th century, historians had become alarmed that such papers were being accidently destroyed, lost, and sometimes only selectively released for scrutiny. Archivists at the National Archives (established in 1934) and elsewhere lamented omissions in the national governmental record that the situation created. Not only might entire files be carried from the White House, but presidential correspondence might also be taken from departmental files. The situation became particularly acute with the creation of the Executive Office of the President in 1939. Franklin D. Roosevelt established a panoply of emergency and wartime agencies within this domain, all of which served the President in immediate and direct capacities and all of which, therefore, could be considered producers of "presidential papers." The potential loss of the documentary materials of these entities presented both a records management and an administrative continuity problem.

Modifying tradition. Addressing this situation, Franklin D. Roosevelt sought to return presidential papers to the public realm through a new type of institution — the federally maintained presidential library. Deciding to build a presidential library on the grounds of his family home in Hyde Park, NY, FDR approved private funding arrangements for the construction of an archival edifice to house and preserve such documentary materials as he might donate, bequeath, or transfer to it. Chartering legislation for the Roosevelt presidential library was enacted in 1939,[2] and the

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[2] 53 Stat. 1062.

Archivist of the United States, acting on behalf of the federal government, accepted the completed facility for federal maintenance on July 4, 1940.[3]

Succeeding to the presidency in 1945, Harry S. Truman began pursuing his predecessor's presidential library model in 1950. While private fund-raising was getting underway, Congress enacted the Presidential Libraries Act of 1955, which established the basic policy for the creation of subsequent federally maintained presidential libraries for Presidents Herbert Hoover, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Gerald R. Ford, Jimmy Carter, Ronald Reagan, George H. W. Bush, and William J. Clinton.[4]

As a consequence of the so-called Watergate incident — the June 17, 1972, burglary at the Democratic National Committee headquarters located in the Watergate office building in Washington, DC — and related matters, the official papers and records of President Richard M. Nixon were placed under federal custody by the Presidential Recordings and Materials Preservation Act of 1974 to assure their availability to federal prosecutors.[5] The statute required that these materials remain in Washington, DC, where they are maintained under the supervision of the Archivist. Thus, Nixon could neither take his presidential records with him when he left office, nor place them in a presidential library outside the nation's capital. Subsequently, a Nixon library was constructed at the former President's birthplace — Yorba Linda, CA. The completed facility was dedicated in July 1990, and, thereafter, remained under private operation. A few years ago, however, negotiations were begun with a view to adding the Nixon library to the presidential library system administered by the National Archives and Records Administration (NARA). Anticipating the subsequent deeding of this facility to the federal government, Congress enacted legislation in

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[3] Waldo Gifford Leland, "The Creation of the Franklin D. Roosevelt Library: A Personal Narrative," *American Archivist*, vol. 18, Jan. 1955, pp. 11-29; Donald R. McCoy, "The Beginnings of the Franklin D. Roosevelt Library," *Prologue*, vol. 7, fall 1975, pp. 137-150.

[4] 69 Stat. 695.

[5] 88 Stat. 1695.

November 2003 amending the Presidential Recordings and Materials Preservation Act to give the Archivist discretionary authority to transfer the Nixon records to an archival depository in accordance with prescribed law.[6] Recently, the National Archives indicated in the congressional justification for its FY2008 budget request that it "has an interim occupancy agreement with the Richard Nixon Library and Birthplace Foundation ... that will soon lead to adding the Yorba Linda, California, library facility to NARA's Presidential Library System." Moreover, NARA stated that it had "begun transferring Nixon Presidential holdings to that facility" and was preparing to hire "the staff in FY 2008 needed to operate the library."[7]

Vacating tradition. Following the enactment of the Presidential Recordings and Materials Preservation Act, Congress developed the Presidential Records Act of 1978, which defined "presidential records" and, for all such materials created on or after January 20, 1981, effectively made them federal property that was to remain under the custody and control of the Archivist when each incumbent President left the White House.[8] Prior to the conclusion of his term of office, the departing President was authorized to specify durations, not to exceed 12 years, for which access to certain specified categories of information shall be restricted. After the expiration of these periods of restriction, the records of the former President could be protected by the exemptions to the rule of disclosure specified in the Freedom of Information Act.[9] Records outside the specified categories of information for which the former President could set the duration of restriction were disclosable either five years after the Archivist obtained custody or on the date the Archivist completed the processing and organization of such records. The records of former Vice Presidents were subject

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[6] Sec. 543 at 118 Stat. 346; George Lardner, Jr., "Nixon Data May Be Calif.-Bound," *Washington Post*, Nov. 13, 2003, p. A12; Associated Press, "Legislators Take First Step Toward a Nixon Library," *Washington Times*, Nov. 13, 2003, p. A4.

[7] U.S. National Archives and Records Administration, *2008 Performance Budget: Congressional Justification* (Washington: Feb. 2007), p. I-11.

[8] 92 Stat. 2523.

[9] 5 U.S.C. §552(b)(1)-(9).

to these same arrangements. A former President was to be notified by the Archivist when records were about to be disclosed, particularly "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have."[10] The statute also stated: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."[11] This provision addressed the so-called "executive privilege" or the privilege of the Executive to exercise a claim of constitutionally based privilege against the disclosure of presidential records. A subsequent, related report by the House Committee on Government Reform offered the following commentary.

> With respect to [this provision], the authors of the Presidential Records Act were mindful of two Supreme Court decisions that affirmed the existence of executive privilege covering presidential records: *United States* v. *Nixon*, 418 U.S. 683 (1974), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). In the latter decision, the Court specifically recognized the right of a former President to claim executive privilege. However, there is sparse judicial precedent concerning the parameters of executive privilege. For example, in *United States* v. *Nixon*, 418 at 706, the Court observed that a "broad, undifferentiated claim of public interest in the confidentiality of" Presidential communications is less weighty than "a claim of need to protect military, diplomatic, or sensitive national security secrets."
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> The scope of the privilege is particularly uncertain in the case of a former President and in the case of records that are 12 or more years old. In *Nixon* v. *Administrator of General Services*, 433 U.S. at 450-451, the Supreme Court observed:
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> > [T]here has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in presidential libraries *** for governmental preservation and eventual disclosure *** The expectation of the

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[10] 44 U.S.C. §2206.

[11] 44 U.S.C. §2204(c)(2).

> confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.[12]

Jimmy Carter was the last occupant of the Oval Office who could freely take away his records and papers. However, Carter's successor, Ronald Reagan, in the closing days of his second term as President, issued E.O. 12667 of January 18, 1989, "in order to establish policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the Presidential Records Act of 1978."[13] Basically, the order required the Archivist to notify the incumbent President and the former President whose papers were involved of his intent to disclose publicly presidential records which were not otherwise subject to protection under the terms of the Presidential Records Act. The Archivist was to identify any specific materials in the records to be disclosed which "may raise a substantial question of Executive privilege." As defined in the order, a "substantial question of Executive privilege" exists if "disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch." The incumbent President and the former President whose papers were involved might assert executive privilege to prevent the disclosure of records either as a consequence of the Archivist's notice and identification or on their own initiative. The first incumbent President to exercise this authority — on at least three occasions — was President George W. Bush.[14] To date, no former President has directly exercised this

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[12] U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, report to accompany H.R. 4187, 107th Cong., 2nd sess., H. Rept. 107-790 (Washington: GPO, 2002), p. 5.

[13] 3 C.F.R., 1989 Comp., pp. 208-210.

[14] Josh Chafetz, "The White House Hides History: Cover Letter," *New Republic*, Aug. 27 and Sept. 3, 2001, pp. 20, 22-23; George W. Lardner, Jr., "Release of Reagan Documents Put on Hold," *Washington Post*, June 10, 2001, p. A5; Christopher Marquis, "White House Again Delays Release of Reagan Papers," *New York Times*, Sept. 1, 2001, p. A9.

authority. The Reagan order, E.O. 12667, was revoked by E.O. 13233 of November 1, 2001.[15] Key provisions of E.O. 13233, as summarized in a report by the House Committee on Government Reform, are as follow:

- The Archivist will notify the incumbent and former Presidents of all requests for records of a former President after the restriction period [up to 12 years] expires.
- The Archivist is prohibited from releasing any such records unless and until both the incumbent and former President agree to their release, or until the Archivist is directed to release the records by a final court order.
- "Absent compelling circumstances," the incumbent President will concur in a former President's determination of whether or not to claim executive privilege. The Order does not define "compelling circumstances."
- If the incumbent President concurs in a former President's claim of privilege, the incumbent President will support the claim in any litigation. Even if the incumbent President disagrees with a former President's claim, the Archivist still must honor that claim and withhold the records.
- A former President may designate a representative or group of representatives to act on his behalf for purposes of the Presidential Records Act and the Executive Order.
- The Order establishes a 90-day target date for review of access requests by members of the public. However, the review period can be extended indefinitely. The Executive Order establishes a shorter target date for review of access requests by Congress or the courts, specifically 21 days for a former President's decision and another 21days for the incumbent President's decision. These target dates likewise can be extended indefinitely.[16]

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[15] 3 C.F.R., 2001 Comp., pp. 815-819.

[16] U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, H. Rept. 107-790), pp. 6-7.

Opposition to the order was expressed by historians, political scientists, journalists, and lawyers, among others. A November 6, 2001, *Los Angeles Times* editorial, for example, indicated that the order "would nudge the nation's highest office back toward democracy's dark ages, when history effectively could be kept from the public." Three days later, the *Washington Post* editorially characterized the order's procedures as "a flawed approach on records." *USA Today*, in a November 12 editorial, regarded the order's arrangements as having a strong potential for "self-serving secrecy." In a November 15 editorial, the *New York Times* commented that the order "essentially ditches the law's presumption of public access in favor of a process that grants either an incumbent president or a former president the right to withhold the former president's papers from the public," and concluded that, if a remedy for the situation was to be realized, "Congress must pass a law doing so."[17]

A vehicle for overturning the order was introduced in the House as H.R. 4187 on April 11, 2002, by Representative Stephen Horn for himself and 22 bipartisan co-sponsors. It also amended the Presidential Records Act to provide for the exercise of executive privilege in terms more limited than those of E.O. 13233. The Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, under the chairmanship of Representative Horn, held hearings on E.O. 13233 and H.R. 4187, respectively, on November 6, 2001, and April 24, 2002.[18] The Committee on Government Reform held a hearing on the impact of the executive order on the public availability of presidential records.[19] Summarizing these proceedings, the subsequent report

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[17] U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *Hearings Regarding Executive Order 13233 and the Presidential Recordings Act*, hearings, 107th Cong., 1st and 2nd sess., Nov. 6, 2001; Apr. 11 and 24, 2002 (Washington: GPO, 2002), pp. 243-246.

[18] U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *Hearings Regarding Executive Order 13233 and the Presidential Recordings Act.*

[19] Shortly after the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations held its hearing on E.O. 13233, a complaint was filed on November 28, 2001, in the United States District Court for the District of Columbia to obtain a declaratory

(continued...)

accompanying H.R. 4187, as amended, stated: "Witnesses at these three hearings included historians, lawyers and other experts," who "testified that Executive Order 13233 violat[ed] the Presidential Records Act and greatly inhibit[ed] the release of presidential records as envisioned by the Act."

> With one exception, the witnesses who specifically commented on H.R. 4187 strongly supported the bill and testified that the bill did not raise serious constitutional issues. One witness took the position that H.R. 4187 was unconstitutional, and indeed, that virtually any legislation to supercede or alter the Executive Order would be unconstitutional. The Administration declined an invitation to testify at the April 24 hearing on H.R. 4187. However, the Department of Justice later submitted a letter opposing the bill (see Appendix I [of the report]).[20]

Concerning the Department of Justice letter opposing the bill, the committee report accompanying H.R. 4187, as reported, offered the following comments.

> The Justice Department's letter does not require a detailed response. Most legal experts who testified before the committee persuasively refuted the Justice Department's constitutional and other legal arguments against the bill. These witnesses testified that the bill is within the constitutional authority of Congress and represents an appropriate response to the Executive Order that is itself in violation of the Presidential Records Act and is likely unconstitutional.
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> Nevertheless, the committee wishes to respond briefly to two points in the Justice Department's letter. First, the department maintains that the Executive Order is intended to

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[19] (...continued)
judgment that the Archivist and NARA must administer the Presidential Records Act without regard to the terms of E.O. 13233, and to compel the release of presidential materials of former President Reagan that were in the custody of NARA and allegedly were being withheld in violation of the act. The District Court subsequently ruled on March 28, 2004, that plaintiffs' past injury "is simply not redressable by the relief they seek, and their only possible redressable injury at this stage simply is too hypothetical." Finding that "Plaintiffs' claim is not ripe for review, and cannot be ripe until Plaintiffs have some actual or imminent redressable injury," the court concluded that "this suit [is] nonjusticiable, and consequently the Court has no jurisdiction over this case at this time." *American Historical Association* v. *National Archives and Records Administration*, 310 F. Supp. 2d 216 (D.D.C. 2004). Plaintiffs' motion to alter or amend the judgment granted, plaintiffs required to show a particular need for documents to overcome the presidential communications privilege. 402 F. Supp. 2d 171 (D.D.C. 2005).

[20] U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, H. Rept. 107-790, p. 3.

facilitate the release of records under the Presidential Records Act and that it has worked well. The Executive Order has not worked well. It has served to delay the public disclosure of records far beyond the release dates envisioned by the Act. Second, the department maintains that opposition to the Executive Order is premised on the view that a former President should not have the right to claim executive privilege. This is simply not true. The bill recognizes that, under Supreme Court precedent, a former President can invoke executive privilege. The purpose of the bill is to ensure that this right is exercised in a manner that does not undermine the Presidential Records Act.[21]

The measure, with an amendment, was favorably reported from committee on a voice vote to the House on November 22, 2002, but did not receive a floor vote prior to the final adjournment of the 107th Congress.[22] Representative Horn did not stand for reelection to the next Congress, and no successor legislation was subsequently introduced in either house during the 108th and 109th Congresses. Today, in the course of examining executive branch implementation of, and compliance with, the Presidential Records Act of 1978, this Subcommittee has before it the question of the need for such legislation.

Thank you for your attention. I welcome your questions.

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[21] Ibid., p. 9.

[22] U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, H. Rept. 107-790.

Mr. YARMUTH. Thank you both for your testimony.

Dr. Relyea, as you are aware, some have suggested that because Executive Order 13233 grants a former President the power to assert privilege over the release of records, that it may violate the intent of the Presidential Records Act, to ensure that Presidential records are treated as Federal property and not personal property. Do you agree with that assessment, or do you take a different view?

Mr. RELYEA. I agree that the Executive order distorts the original intent of the Presidential Records Act. It, in effect, turns the situation of the Presidential Records Act on its head. The President, in asserting Executive privilege, directs the Archivist not to disclose papers, and the Archivist is expected to abide by that. Whereas, I think the original intent of the Presidential Records Act is to have the Archivist exercise a discretion when a former President asserts Executive privilege. If he disagrees with a former President, then it is up to the former President to seek judicial enforcement of his position.

Mr. YARMUTH. Thank you.

Dr. Weinstein, could you describe for us in general terms the major challenges that NARA faces in archiving and releasing Presidential records?

Mr. WEINSTEIN. Certainly, Mr. Chairman. We begin with the shortage of trained, adequate staff for the purpose of doing this. I will not go into detail because I do not have to, but as I think you know, this has been a dilemma for the last several years.

Second, we do have a situation now in which I think it would be interesting to see what action, if any, will be taken by the Congress in this regard. It would be unseemly of us to suggest anything because we are here to implement. We are trying to implement in a very serious way what is possible under the law. It would be nice to have the authority again to have a bit more authority that we had in terms of being able to administer, as Dr. Relyea was saying, the act, but that authority may come back. We will see.

In general terms, I think it is fair to say that trying to administer fairly a statute in which there is not necessarily universal agreement as to its validity, an Executive order presents its own problems.

Mr. YARMUTH. Thank you. I am informed I mispronounced your name. I apologize for that.

Mr. WEINSTEIN. I don't think you have. It depends on which side of the Grand Concourse you are from, Weinstein on this side and Weinstein on the other. [Laughter.]

Mr. YARMUTH. Good. Well, I get mine mispronounced 20 different ways, so that is fine.

How much money from NARA is dedicated annually to activities surrounding the release of Presidential records? And how does the President's fiscal year 2008 budget match up with that expense? And how much additional money and resources would be required to do an adequate job, in your opinion?

Mr. WEINSTEIN. I appreciate the questions, especially since I am going to turn to my colleague, Sharon Fawcett, who runs the Presidential Library System, for the first answer to that.

Mr. YARMUTH. Thank you. Welcome.

STATEMENT OF SHARON FAWCETT

Ms. FAWCETT. Thank you, Mr. Chairman.

The annual appropriation for Presidential libraries this year is just short of $58 million. We have dedicated to processing Presidential records about 42 percent to 45 percent of the staff in the individual Presidential libraries. At the Reagan Library, we have 45 percent of the staff that are Archivists or archive specialists charged with reviewing the records. At the Clinton and Bush libraries, it is 42 percent of the appropriated staff.

That does not translate into very many Archivists. It is 10 Archivists at Reagan and, let's see, it is 8 Archivists at Bush and 10 Archivists at Clinton. So it is not a substantial amount that would average about $1.7 million.

Mr. YARMUTH. And that is what you think we would need to add to the President's budget request to bring it up to an adequate number?

Ms. FAWCETT. For our request for the Bush Library, we have begun planning for a library a couple of years out. This year, we will be hiring four Archivists for future work in the Bush Library so that we can train them on the FOIA process and the review of Presidential records. We hope to hire up to 20 Archivists for the Bush Library. So we plan on doubling the staff.

I am not sure that even that is sufficient to adequately manage the workload. Just to give you an example of how the workload has grown, the number of FOIAs filed the first year that the Reagan Library opened for FOIA was 103 requests. Likewise for Bush, 91 requests. For Clinton, in the first year, we had 336 FOIA requests for a backlog of over 9 million pages.

Mr. WEINSTEIN. Congressman, I would add to that only the fact that the exact figure one would want would depend, to some extent, on how quickly one wanted to end the backlog in this process, the 3 or 4 or 5 year delay sometimes in processing material, but we can get you those figures and we will.

Mr. YARMUTH. Thank you very much. My time has expired.

Mr. Turner.

Mr. TURNER. I noted in the testimony that millions of pages of records have been released, and you confirmed that again with respect to the requests. Can you tell us what percentage, or the number of records that are withheld?

Ms. FAWCETT. Of the 2.1 million pages that have been opened for research so far, the number of pages closed in all restriction categories, I am sorry, I can't tell you the number for the past 2 years under the Executive order. I have the total number since we started opening PRA records in the library, but I can get you the other figure.

Mr. TURNER. The total number is fine, at least.

Ms. FAWCETT. OK. About 391,000 pages have been closed at Reagan; over 8 million pages have been opened. At Bush, 538,000 pages have been closed; over 5 million pages have been opened; at Clinton, 1.220 million pages have been opened; 27,000 pages closed.

Mr. TURNER. OK. We have had testimony concerning open records before the subcommittee in other areas. One of the questions that other agencies have acknowledged as relevant post-9/11

is the review of documents as they might pertain to national security or issues where we would not want them to be released.

Does 9/11 give us a context where that review might be at a different standard than it was pre-9/11?

Mr. WEINSTEIN. Well, I don't think I would say so. I say we have been fairly consistent in that regard. Although, once again, there would be areas in which obviously comments on 9/11 would be pivotal because that would be the subject matter. But if you are talking about the process itself, we have——

Mr. TURNER. I am talking about subject matter. Does it give you additional pause in subject matter areas where you had no pause before?

Mr. WEINSTEIN. Oh, of course. It absolutely has. Sure.

Mr. TURNER. Great. I think your affirmative response to that is very important, because that is something that other agencies have acknowledged, and it certainly provides some context to the Executive order of a greater concern, not of secrecy, but one of national concern, and in giving us some additional time to reflect on the subject matter as we see that the world is changing.

Mr. Weinstein, one of the things that obviously we are concerned about in Presidential records and their release is eliminating a context of partisanship. That relates both to the fact they are being released or they are not being released. Wouldn't you agree that is one of the concerns that people have about how records are handled, both for present issues of partisan flavor and/or for interpretation of past issues?

Mr. WEINSTEIN. Well, it is certainly a concern that one might have, should have perhaps generally, but I can tell you as a matter of fact that I have led a very bipartisan life in Washington, if you know something about my background. I ran the Center for Democracy for 16 years. Basically, there is nothing more important to me than maintaining the integrity of the documents and of the Archives against partisanship.

Mr. TURNER. Mr. Weinstein, before my time is up, obviously the Sandy Berger incident is one that has caused pause in the manner in which the Archivist handles records such as this. Paul Brachfeld, the Inspector General, had some concerns as to the manner in which he was treated, and the matter was treated. There was just recently a Washington Post article where it was indicated that he had received an e-mail from the Archivist's lawyer saying, "I don't think it comes as a great surprise if I were to venture the opinion that senior management of this agency have serious problems with the manner in which your office conducted itself during the Berger investigation."

Obviously, the concern that we have in the Berger investigation is that we want to err on the side of making certain we know the facts, because it could impact the availability of information or what information has been available to some, and perhaps to others.

Could you please comment on that matter and how it might reflect on the Archivist's handling of these records?

Mr. WEINSTEIN. I am delighted to. I am happy to comment on it.

First of all, Sandy Berger was arrested years before I got to the Archives. This was 2003, as I recall, and I didn't become Archivist

until 2005. So I can't speak to that particular element in the process.

But second, that letter you quoted from an Archives attorney received from me a very harsh note about sending letters of that kind. The Inspector General received from me, quoted in the same Washington Post article, a letter in which I indicated, and he knew this as well, the Inspector General, that the letter did not reflect my concerns and did not reflect my perspectives or the perspectives of the majority of his colleagues at the National Archives.

The IG has his job to do. I have my job to do. I think we have a great deal of mutual respect, and that is the way I will continue to behave toward the thing.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. CLAY [presiding]. Thank you very much, Mr. Turner.

Mr. Weinstein, the Executive Order 13233, Further Implementation of the Presidential Records Act, was issued by President Bush in November 2001, replacing the previous implementing order issued by President Reagan. Among other changes, the Bush Executive order extended the period for notification and review from 30 days to 90 days. Can you explain this change and its impact, if any? Specifically, have you observed a significant increase in the amount of time used in the notification and review process?

Mr. WEINSTEIN. We very much have, Mr. Chairman, but that is in part because of a greater caseload, a greater number of people who want to make use of the Reagan Library for research purposes and raise Freedom of Information requests. The issue of resources is never far from the center of the matter, Mr. Chairman. I would be grateful for the subcommittee's concern about that.

Sharon, do you have anything to add?

Mr. CLAY. Ms. Fawcett.

Ms. FAWCETT. Yes. As we said earlier in our testimony, the backlog is quite significant. While the notification process adds time to it, when you consider that the backlog is 5 years in the first place, it is not a significant amount of time as we have in the backlog.

Mr. CLAY. Mr. Relyea, have you noticed any impact with the new Executive order?

Mr. RELYEA. I am not really in the position to assess that, as folks at the Archives are. My research is such that I would have to rely upon other management studies, which I am not aware of, and they would certainly be coming from the Archives in that regard.

Mr. WEINSTEIN. Mr. Chairman, can I add a word in response to Mr. Turner's original question?

Mr. CLAY. Sure.

Mr. WEINSTEIN. It is a very serious point. It would be nice if we lived in a country in which the National Security Adviser to the President of the United States could be matter of factly trusted to engage in no shenanigans and no lawbreaking enterprises, and we could all have confidence in that without putting into effect the security measures that test that.

Unfortunately, although I had been under the impression before reading all of this, since I was not Archivist yet, that was the kind of country we live in. Obviously, this did not turn out to be the case with the gentleman in question.

So what we have done at the Archives is to strengthen in measurable ways our security mechanisms to avoid any such process from happening in the future. I didn't want to leave Mr. Turner's question unanswered.

Mr. CLAY. Thank you for that response.

Before I dismiss the panel, because we are about to go do some votes, Doctor, your testimony states that because PRA records are subject to FOIA and declassification requirements, NARA staff has less time to conduct the systematic processing of records. I have two questions regarding this.

Is FOIA the problem, or is the real problem staff shortages and resource limits?

Mr. WEINSTEIN. That is a significant part of it, Mr. Chairman, a very significant part of it. And also one keeps in mind the sheer volume, just in terms of the volume of documents system-wide. We allegedly have 9 billion. I have not counted them all, so I can't say, but 9 billion documents. That requires a lot of processing. So finally, that is an issue.

Ms. FAWCETT. Could I add to that?

Mr. CLAY. Yes, Ms. Fawcett.

Ms. FAWCETT. I think the PRA envisioned that during the first 5 years before the records were opened to FOIA, the Archives would be able to systematically process a good deal of those materials. In fact, during the Reagan and first Bush post-Presidential periods, we did process upwards of 4.5 million pages.

However, the number of special access requests by the Congress, by the courts, and by those with statutory rights to view the records, has increased considerably, and that takes most of the staff time. So there has been little time for the systematic processing.

One of the things that we are trying to do to speed up our processing efforts and to be more efficient is to take the FOIA requests we get and kind of clump them together, as these are all requests that kind of relate to this subject area. We will process that as an entire file more systematically, and then notify each one of the researchers that we have processed some major files that they would be interested in. It has helped to speed up the processing a little at Reagan. We are going to try it at some of our other libraries, but we still have significant backlogs even with that effort.

Mr. CLAY. Thank you for that response.

Mr. Turner, any further questions?

If there are no further questions for this panel, I want to thank the panel for your time and your testimony today.

I will now call the committee into recess until approximately 3:15 p.m., and then we will take testimony from the second panel.

Thank you all so much for your testimony.

[Recess.]

Mr. CLAY. The Subcommittee on Information Policy, Census, and the National Archives will resume.

We are fortunate to have an outstanding group of witnesses on our second panel.

Mr. Thomas Blanton serves as Director of the National Security Archive at George Washington University in Washington, DC. He is a noted expert on government information policy. He is a past

recipient of the American Library Association's James Madison Award Citation for defending the public's right to know. He has coauthored several books, and his articles have appeared in numerous publications, including the International Herald Tribune, the New York Times, the Washington Post, and the Wall Street Journal. Welcome, Mr. Blanton.

Mr. Scott Nelson is an attorney at the Public Citizen Litigation Group in Washington, DC, where he has practiced since 2001. Previously, Mr. Nelson's work focused on a variety of constitutional and administrative law issues, including the disposition of the Presidential papers of former President Richard Nixon. Welcome, Mr. Nelson.

Mr. Steven L. Hensen is director of Technical Services in the Rare Book, Manuscript, and Special Collections Library at Duke University. He is recognized both nationally and internationally as an authority on archival description and access, and he has taught more than 50 workshops and consulted extensively on a variety of archives matters. He is a past President of the Society of American Archivists, from 2001 to 2002, a former member of its Governing Council, and a fellow at that organization. You are also welcome, and thank you for being here.

Dr. Robert Dallek is a noted Presidential biographer whose published works have covered the life and times of Presidents Franklin Delano Roosevelt, Kennedy, Johnson, and Reagan. He has also served as a faculty member at Columbia University, UCLA, and most recently at Boston University. In addition, Dr. Dallek has served as a consultant to many films and documentaries, and is often quoted in national publications and newspapers on Presidential history and politics. Thank you for being here.

And finally, Dr. Anna K. Nelson currently serves as Distinguished Historian in Residence at the American University. She has previously served as a member of the State Department Historical Advisory Committee, and received a Presidential appointment to the John F. Kennedy Records Review Board. Her past articles and essays have appeared in the Journal of American History, Diplomatic History, Journal of Military History, Human Studies, and Political Science Quarterly. Welcome to the committee.

It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify. Please rise and raise your right hands.

[Witnesses sworn.]

Mr. CLAY. Thank you. Let the record reflect that all witnesses answered in the affirmative.

As with panel one, I ask that each witness give an oral summary of his or her testimony and keep the summary under 5 minutes in duration. Bear in mind, your complete written statement will be included in the hearing record.

Mr. Blanton, let's begin with you.

STATEMENTS OF THOMAS BLANTON, DIRECTOR, NATIONAL SECURITY ARCHIVE, GEORGE WASHINGTON UNIVERSITY; ROBERT DALLEK, AUTHOR/HISTORIAN; SCOTT NELSON, SENIOR ATTORNEY, LITIGATION GROUP, PUBLIC CITIZEN; ANNA K. NELSON, DISTINGUISHED HISTORIAN IN RESIDENCE, THE AMERICAN UNIVERSITY; AND STEVEN L. HENSEN, DIRECTOR OF TECHNICAL SERVICES, RARE BOOK, MANUSCRIPT, AND SPECIAL COLLECTIONS LIBRARY, DUKE UNIVERSITY

STATEMENT OF THOMAS BLANTON

Mr. BLANTON. Thank you very much, Mr. Chairman.

I have just have three points to make today. You have my written statement, which gives it in detail. The three points: one is, is the Presidential Records Act System working? No, it is in crisis, and I will back that up. Second, is it the fault of the Executive order? Yes, in part, but not completely. And I will back that up. And third, what do we do about that?

On the Presidential Records Act, we got a little bit of good news from the first panel, when Archivist Weinstein said that we have released 2.1 million pages of records under the Presidential Records Act since this Executive order came in. He announced that like we were supposed to applaud. Mr. Chairman, that is less than half as many records out of the entire Presidential Library System than the Reagan Library alone produced in the previous 5 years.

On the front page of my written testimony today I have given you a little chart. What happens when you write the Presidential library if you are a citizen, and you ask for one of President Reagan's records? Before this Executive order, they wrote you back a letter that said it will take about 18 months. And that is not unreasonable in my experience, and we have hundreds of requests currently pending with Reagan and all the libraries from Eisenhower through Clinton. It is highly classified. It is high level material. There are sensitivities there. Eighteen months is not unreasonable for the government to take to review it.

Today, you will get a letter back that says it is 78 months. In other words, 6 years have elapsed since the White House intervened in the Presidential records process to stop the release of Reagan records, back in early 2001. After those 6 years, 5 are pure delay, pure delay, and you see the sequence of events.

Now, it is a crisis, because the system is not working the way the Congress intended, or I would argue our constitutional framers intended, because we did not intend our Presidents to be kings or to be allowed to act like kings. Their records belong to us.

So is it the fault of the Executive order? I would say yes, in part, and you had Archivist Weinstein admit that. He said that, oh, it used to only add about 90 days, then it added about 170, days, and now it is adding an average of back to 110 days. That was his testimony. My experience is it is well over a year, and that is just the direct delay. In my testimony I have direct quotes from the professional Archivist at the Bush Library, who over the phone to me said, well, it was cleared for release in November 2005. Now, these are documents that Gorbachev has already published in Russian. I am just asking for the American versions of them. Right? It

makes us look pretty bad if we can't produce the transcript of the Malta Summit.

Well, the Bush Library says, well, we sent it off to the White House in November 2005, and there is no limit, as you know, there is no deadline, so we have no idea when it will come back. Under the old system, under President Reagan's Executive order, I would have had that material in December 2005. OK?

But it is not all Executive order, because there are huge resource problems at the National Archives, and it doesn't help when their basement floods, and they have to use up their contingency funds. They have hiring freezes, staff problems, vacancies. You heard from Ms. Fawcett about how they are even having problems staffing up now. You have a totally broken declassification system, so you have hundreds of millions of pages that are ready for the public to see, that they don't have the staff to put on the shelves.

Then you have agencies like the CIA and the Air Force going back in to the public stuff and taking it back, sticking the toothpaste in the tube. That is what was exposed last year, thousands and thousands of pages. You have an endless daisy chain of agencies that all insist on having their piece of that document. If my cabinet secretary was at the National Security Council meeting, by gosh, I get a chance to review that document. I have an equity in that document. This is insane. It is no way to run a system.

So what do we do to fix it? One, take out those worst parts of the Executive order, that lack of a deadline, the expansion of privilege for the Vice President, the provision that gives Julie Nixon Eisenhower and her kids the right to assert Executive privilege. I didn't see that in my copy of the Constitution, Mr. Chairman.

You can do that, and that would send a signal to the rest of the agencies that you have to respond. You have to process this stuff. The Freedom of Information Act says 20 working days, 20 working days, or 78 months. So the legislation being introduced today is a great first step. It will have a psychological impact on the bureaucracy.

What you also have to do is make sure the National Archives has the resources to deal with that huge backlog, and to staff up so they can take this on.

Third, they have to get ahead of the curve on the electronic records. They have a backlog of paper stuff, and they have tens and hundreds of millions of e-mail coming into the system. Some of that is my fault. My organization brought the lawsuit that saved the White House e-mail. I plead guilty, Mr. Chairman, but I think that is important for accountability and for history, that their e-mail gets preserved.

What else can we do about it? We can clean up the classification system. There are some bills to stop the agencies from stamping these sensitive but unclassified marks all over the place, with no limits, not even counting how many times that has happened. They have to stop that.

We have to set up a declassification center out at National Archives to cutoff this daisy chain, so the agencies don't just send those files around and around and around and around. Like, what was that Charlie who gets on the MTA and will never return? No,

he never returns; his fate is still unknown. That is what happens today.

So, Mr. Chairman, this hearing and the legislation being introduced today is a great first step. I commend you for your attention to this problem, because it is a crisis. History is the worse for it. Accountability is the worst for it. Our constitutional framework is the worse for it. I really applaud your attention to this crisis.

Thank you.

[The prepared statement of Mr. Blanton follows:]

Statement by **Thomas S. Blanton**, National Security Archive,
George Washington University, (www.nsarchive.org)

March 1, 2007 Hearing on the Presidential Records Act

Mr. Chairman and members of the subcommittee, thank you for inviting me to testify about the crisis currently facing one of the glories of our democracy, the Presidential Records Act. Other experts you are hearing today will give you the legislative history and the legal reasoning behind this landmark law; my own conviction is simply that this statute fulfills a core motivation of our Constitutional system, that of preventing our Presidents from becoming – or acting like – kings. Their records actually belong to us, the citizens, and the Presidential Records Act makes that core principle a reality. Or at least it used to.

The cover page of my testimony today contains a simple chart that documents the crisis. **Since 2001, the government has added five years of delay into the process of releasing presidential records**. These are statistics from the Reagan Presidential Library – their official estimates of response times that they send to you when you request documents. The delay has risen from 18 months in 2001 to 78 months today.

Let me give you some of the specifics. The late President Ronald Reagan left office 18 years ago, in January 1989, and the Reagan Library began making his White House records public in 1994, as the law envisions, with most restrictions expiring by the 12-year mark, or January 2001. The Freedom of Information Act

says federal agencies have to respond to requests for records within 20 working days (roughly four weeks), yet if you write the Reagan Library today asking for a specific record, the Library staff will write you back with an estimate of 78 months (six and a half years!) you will have to wait before they complete processing. At the 12-year mark, that is, in early 2001, the Reagan Library's estimated response time was only 18 months. For organizations like mine that are veteran users of the Freedom of Information Act, 18 months is not an unusual delay when the subject matter involves classified documents or complicated processing.

But early 2001 is the moment that the new White House counsel (now the Attorney General) decided to hold up the scheduled release of the infamous 68,000 pages of Reagan Library records that were ready to go, cleared by the professional archivists and the career reviewers, under the process that actually worked in the 1990s. During 2001, as those 68,000 pages sat on a White House lawyer's desk, the delay estimated by the Reagan Library went from 18 months to 24 months, by the time President Bush issued his Executive Order 13233 in November 2001. Since then, the delay reached 48 months in 2003, and 60 months in 2005, before its current 78 months.

In other words, **we are only six years down the road from the initial White House decision in early 2001 to intervene in the Presidential Records Act process, and five years of that turns out to be pure delay.**

The delay and the backlog are not driven by the restrictions in the statute. Again, look at the Reagan Library experience. Between 1994 and 2001 – the statutory 5-to-12-year period in which access limitations apply – the Reagan Library opened some five million pages of presidential records. Since 2001 – the 12-year mark when the statutory access limits are lifted – that total is only a few hundred thousand. At this rate, as the National Archives admits, it will take 100 years to open all of President Reagan's White House records.

I am using the Reagan Library example because I visited Simi Valley in January, when I was able in about two days – thanks to the highly skilled and professional archival staff there – to look at every page that has been declassified since 2001. Four stacks of paper, about 3700 pages in all, a sad contrast to the millions of pages opened in the 1990s. But the same blockage is on view at the other presidential libraries as well. For example, the former Soviet leader Mikhail Gorbachev published in Russian in 1993 his interpreter's verbatim notes of the December 1989 summit meeting at Malta with President George H.W. Bush. Citing the Russian publication, I asked for President Bush's transcripts of Malta with a Freedom of Information request that went to the College Station, Texas-based Bush Library in 1999. In 2001, the Bush Library responded that the documents had been referred out to the agencies for declassification review, and by November 2005 that review was complete, the Library told me.

The next conversation is the one that became absurd. The documents were cleared, no damage to national security (I already knew that from reading the Russian transcript), so when would I get the package? The Bush Library professional staff said, **"As you know, the present and former Presidents under the Executive Order have no time limit for their review, and the White House does have a large backlog."** How long will it take, how long does it take on average? "There's no average, I really don't know, I wish I could help you, but it's all in Washington at this point." Indeed, it's all in Washington at this point.

The question on the table today is executive branch implementation of the law, and there, to quote the immortal phrase, "Houston, we've had a problem." We now have actual data and more than six years experience with which to test the claims made about Executive Order 13233 back in 2001. President Bush told the press on November 2, 2001, "I don't see this as anything other than setting a set of procedures that I believe is **fair and reasonable**." The White House press secretary, Ari Fleischer, told the press briefing on November 1, 2001, "... [T]hanks to the executive order that the President will soon issue [that day], more information will be forthcoming. And it will be available through a **much more orderly** process." A few days later, the acting assistant attorney general told this committee that "President Bush's executive order establishes **clear, sensible, and workable** procedures that will govern the decisions by former Presidents and the incumbent President whether to withhold or release privileged documents." (M. Edward Whelan III, November 6, 2001) [Emphasis added]

None of that turns out to be true, we now know. There was a fair, reasonable, orderly, clear, sensible, and workable process for Presidential records in place during the 1990s that Executive Order 13233 overturned and replaced with the opposite. I would also argue, and my organization is a co-plaintiff in the lawsuit that makes this argument, that the Order is contrary to the statute and therefore illegal. Here I will leave that argument to the experts, and you will hear our able attorney Scott Nelson of Public Citizen Litigation Group today on this subject.

My point is a different one: That the Executive Order is not just wrong, but stupid. **The Order added White House review into a process that did not need such review**. Before the Order, the National Archives had released millions of pages of presidential records, and most strikingly, thousands of hours of Oval Office audio tapes containing the most sensitive conversations at the highest level, with no damage to national security or other national interests. That is the Archivist's job, and the White House should have left that job to the professionals, instead of stacking up the files on the already overloaded desks of White House lawyers. Surely, those lawyers have better things to do with their time and more pressing policy and legal issues on which they should be working.

The shell game the government played with the Reagan documents in our litigation shows the kind of wasteful and counterproductive withholding of historic files that the Executive Order in effect invites. For example, after the

representatives of former President Reagan asserted privilege over 11 documents in our litigation, our ace attorney found one of them in the public domain, a six-page memo dated December 8, 1986 to the President and the Director of Public Affairs titled "Talking Points on Iran/Contra Affairs." The Bush White House then intervened and made its own privilege assertion on nine of the documents, not invoking the Executive Order, so that the government's lawyers could claim that no documents were being withheld under the Order and thus our lawsuit was moot. That claim has not worked for the government, and the federal judge in the case has found that the delays in access amount to an "injury in fact."

Back in 2001, I predicted that the burden of documents review would soon bring the White House to its senses, and the counsel's office would revise the Order, but I was wrong; instead, all we have seen is delay and more delay. Back in 2001, some scholars speculated that the stall on the release of Reagan Library records was because there must be embarrassing material in those 68,000 pages, perhaps about the Iran-contra scandal, perhaps about former President George H.W. Bush. Now, years later, we have the 68,000 pages, and scholars have found no substantive reason in those files for any serious sensitivity. Nowadays, the cynical view is that the process is deliberately inefficient – if the White House was setting out to stall and stonewall, it could hardly have been more effective.

I am not prepared to adopt the cynical view, yet. My own conclusion is that the administration's top lawyers asked only one question about implementation of

the Presidential Records Act, and the question was how to increase presidential power over that implementation. They did not ask what was the most efficient process, what was the most doable process, what we could learn from the recent past, what the medium- or long-term outcomes might be. As on so many policy issues of the past few years, the exit strategy and the cost-benefit analysis seem to be missing from the decision making.

Vice President Cheney has given us the clearest expression of this approach, which I believe explains the motivation behind EO 13233. ABC's Cokie Roberts asked the Vice President back in January 2002 why he was resisting giving his energy task force documents to the General Accounting Office, thus turning a one-day story about his meetings with former industry colleagues into a year-long story that suggested coverup. Vice President Cheney began by saying that withholding the information was where "the lawyers decided" to draw the line, but went on to cite "an erosion of the powers and the ability of the President of the United States to do his job" because of "unwise compromises that have been made over the last 30 or 35 years." The Presidential Records Act is surely on the Cheney list of those laws that eroded White House power. The Executive Order was clearly an effort to take back that power.

We now know that Executive Order 13233 creates real delay in the system, but I need to be very clear about the fact that the Order is not the only reason for the delay. The National Archives suffers under severe resource constraints, and it

doesn't help when Constitution Avenue floods their basement, or the pipes burst out at the Suitland Federal Records Center. The National Archives labors under an enormous backlog of records that have already been declassified but not yet "accessioned" (meaning organized and prepared for the public to look through). The overall records backlog has been growing for decades, and the vast expansion of electronic records presents enormous challenges that no one has complete answers for. My own organization brought the lawsuit that forced the National Archives to begin saving the White House e-mail, and we had to overcome three Presidents (Reagan, Bush 41, and Clinton) to win the case. Now there are tens of millions of email records in the system, very few of them processed for public access, and the best the National Archives can do so far is maintain a migration strategy to move them from storage medium to storage medium as the technology changes.

But there are also problems with the ways that the Presidential libraries allocate the resources they do have. For example, the Carter Library has failed even to make an effort to deal with Mandatory Review requests dating back to 1997. The Carter Library has not even formally acknowledged the requests. Apparently, the Remote Archives Capture project, in which the CIA's teams of scanners scooped up Carter records that were classified – in order to automate a process of review back in Washington – absorbed whatever declassification energy existed at the Carter Library. But other Presidential libraries have participated in

RAC and kept their MDR process going, in effect showing they can walk and chew gum at the same time.

Another source of the crisis is that the government is creating record numbers of new national security secrets that will clog the system for decades; and federal agencies still insist on exercising their "equities" to the point of reclassifying records that have already been on the public shelves and on public Web sites. To date, Congress has been part of the problem and not the solution by mandating re-reviews like the Kyl and Lott amendments, which absorb millions of taxpayer dollars combing through already released documents for nuclear-related tidbits that mostly turn out to be outdated Cold War location and policy information, not weapon designs. No doubt this was the inspiration for the reclassification program that was exposed last year, apparently initiated by the CIA and the Air Force to review publicly available records and remove thousands of them from the open shelves. Front-page exposure prompted Archivist Weinstein to halt the program and order an audit that hopefully will produce more rational classification decisions.

Congress can save the Presidential Records Act, and this hearing is obviously a good start. A real solution will have to address the Executive Order as well as the other sources of the blockages in the information arteries of our democracy. On the Order, we now know that litigation will not solve the problem – we helped bring the lawsuit with the American Historical Association as the lead

plaintiff against the National Archives in its capacity as implementer of the Order. But that case has been pending now for almost as long as the delay backlog at the Reagan Library, and it hasn't even reached the appellate court yet.

Congressional action could remove the worst features of the Executive Order. **We need to rescind the veto power the Order gives to former presidents and their descendants; we need to eliminate the Order's invention of a new vice presidential privilege; and we need to restore the 30-day notification process that worked so well in the 1990s.** Interestingly, as you will hear from Scott Nelson, the Department of Justice has never argued in our litigation that these features are somehow constitutionally required, so Congress is free to modify these provisions through legislation.

To address the potential objections of the current or future occupants of the White House, the legislation could include the idea that was in President Reagan's Executive Order, that the Archivist has to notify the White House when the Archivist believes there is an issue with records about to be released that might require review or might raise a privilege issue. But the Archivist should not have to hold up release unless the White House affirmatively asks for that review.

These changes would help immensely, not least by sending a signal throughout the bureaucracy that foot-dragging is no longer acceptable. But Congress will also have to make sure that the National Archives has the resources to clean up the backlog, and get ahead of the curve on electronic records. Congress

will also need to change the declassification process, first by creating a centralized and more efficient process (like the proposed National Declassification Initiative by NARA) that gets us out of the endless daisy chain of agency referrals, at least on the historic documents. Congress also needs to build on the real declassification successes of recent years, specifically the Kennedy Assassination Records Act and the Nazi and Japanese War Crimes legislation, where the law changed the classification standards to reflect the passage of time and the public interest in the material, and set up independent review processes to pry loose these historically valuable records from the cold dead hands of the bureaucrats. Congress should incorporate those already tested standards into a new Historic Records Act that would provide the necessary bypass surgery for our almost completely blocked records system.

I thank you for your attention, I applaud the focus this Subcommittee is bringing to these issues, and I welcome your questions.

Statement by **Thomas S. Blanton**, National Security Archive, George Washington University
www.nsarchive.org

For the March 1, 2007 Hearing: "The Presidential Records Act of 1978:
A Review of Executive Branch Implementation and Compliance"
2154 Rayburn House Office Building
Subcommittee on Information Policy, Census and National Archives
Committee on Oversight and Government Reform, U.S. House of Representatives

Ronald Reagan Presidential Library
Estimated Response Times for FOIAs and MDRs

Date of Request	Estimated Response Time (months)[1]
26 April 2001	**18**
10 May 2001	18
13 November 2001	**24**
27 November 2001	24
24 June 2003	**42**
01 July 2003	42
10 July 2003	**48**
05 August 2003	48
21 August 2003	48
27 August 2003	48
11 September 2003	48
23 September 2003	48
19 March 2004	48
13 April 2004	48
29 April 2004	48
30 April 2004	48
11 May 2004	48
27 May 2004	48
4 June 2004	48
10 June 2004	**52**
18 June 2004	52
30 June 2004	52
2 July 2004	52
6 July 2004	52
15 July 2004	52
12 August 2004	52
16 August 2004	**54**
20 April 2005	**60**
15 December 2005	**62**
21 December 2005	62
4 August 2006	**58**
12 October 2006	**62**
16 February 2007	**78**

Reagan Library delay is now at 6.5 years.

[1] These numbers are actual estimates given by the Ronald Reagan Presidential Library in correspondence to the National Security Archive in response to the Archive's Freedom of Information Act and Mandatory Declassification Review requests.

Mr. CLAY. Thank you so much, Mr. Blanton, for your testimony and your enthusiasm for this subject. It is somewhat comic relief. [Laughter.]

Let me go out of order here. I want to recognize Dr. Dallek. I understand you are under a pretty tight schedule, so we will come back to Mr. Nelson, but you may proceed, Doctor.

STATEMENT OF ROBERT DALLEK

Mr. DALLEK. Thank you very much, Mr. Chairman, and thank you for inviting me today.

Let me begin by just asking the question: Does it matter that we get at these records? Is it useful to the national well being? Access to the fullest possible records in the service of reconstructing the most substantial and honest history of Presidencies is not some academic exercise that should be confined to university history departments.

Rather, it can make a significant difference in shaping the national well being. As John Dos Passos stated it, "In times of change and danger, when there is a quicksand of fear under men's reasoning, a sense of continuity with generations gone before can stretch like a lifeline across the scary present."

What we learn from the opening of records is so instrumental in helping the Nation address serious questions. The fact recently that Admiral Grayson's papers, Woodrow Wilson's personal physician—the Grayson family released new materials that never had been seen by historians and scholars before. What they demonstrated was that Woodrow Wilson was a much sicker man than we even knew. If this material had come to hand decades ago, it seems to me that it would have been instrumental in advancing the discussion, the debate, about having a 25th amendment to the Constitution about Presidential incapacity.

I found in my work on John F. Kennedy medical records, that happily were opened to me, that President Kennedy had serious medical issues. Now, happily, he was able to surmount these, especially during the Cuban missile crisis. But it is the public's right to know.

I have just finished a big book about Nixon and Kissinger, under the heading of advertisements for myself. I had access to 20,000 pages of Henry Kissinger's telephone transcripts. This material had been closed by Dr. Kissinger until 5 years after his death. He was prodded into opening it by the Historical Division of the Department of State. It is such a rich and important body of material, as the Nixon tapes are, as the Nixon national security files are, as Al Haig's chron files are. They tell us so much more about what the public should have known at the time about Vietnam, about the Indo-Pakistan War, about Chile, about a host of foreign policy issues that were vital to the well being of this Nation.

And 35 years later, I am grateful that we are able to get at this material, that we can then turn it into hopefully readable accounts of what went on in this significant Presidential administration. But we need access, and Bush's Executive order carries the possibility that we will lose this access because reasons don't have to be advanced, a timetable doesn't have to be offered. They can hold back on this material in perpetuity.

Abraham Lincoln's papers did not come to hand until 1947. What a loss for the country until we were able to finally get these papers so that we could study the Lincoln Presidency to the extent that it deserved to be studied.

Let me stop here. I think my message is clear enough.

[The prepared statement of Mr. Dallek follows:]

March 1, 2007

Chairman Clay and members of the subcommittee on Information Policy, Census, and National Archives:

Thank you for inviting me to testify about the Presidential Records Act and President Bush's Executive Order 13233.

I testified at earlier hearings in 2002 before a subcommittee of the House Committee on Oversight and Government Reform about the impact of the President's Executive Order on historical scholarship, specifically on the ability of biographers and historians to reconstruct the history of presidential administrations and the role of chief executives in leading the country during good times and bad.

Like three other presidential historians, who testified with me, I raised questions about the chilling effect Executive Order 13233 might have on the ability of historians to produce in-depth studies if presidents and their heirs were given the power to withhold records for undisclosed reasons for indefinite periods of time. The Order, as we understood it, was also to grant vice presidents the same authority to withhold documents relating to their terms of service.

As I argued earlier, President Bush's order carries the potential for incomplete and distorted understanding of past presidential decisions, especially about controversial actions with significant consequences. Consider what difference the release of the Kennedy, Johnson, and Nixon tapes has made in our understanding of the decision-making on Vietnam in these administrations. Consider how much we will lose if representatives of the Reagan, Clinton, and current Bush administrations were in the future to use Executive Order 13233 to hold back documents on the Reagan

administration's decision-making relating to Iran-contra or the Clinton administration's response to intelligence about a potential Al Qaeda attack, or the current administration's decision to fight in Iraq. It is understandable that every president and his heirs wants to put the best possible face on his administration, but an uncritical or limited reconstruction of its history does nothing to serve the long-term national interest.

Because of this, objections to President Bush's Executive Order from the scholarly community remain as strong as ever. As Nancy Kegan Smith, the director of the Presidential Materials staff, and Gary M. Stern, the National Archives and Records Administration's (NARA) General Counsel, emphasized in their fine 2006 *Public Historian* article on "Access to Records in Presidential Libraries," the private control of presidential materials until 1981 had resulted in "a loss to scholars and the general public of the inside history of both the presidency and the nation's presidents."

This is not to suggest that we have had anything like a sanitized or uncritical reconstruction of pre-1981 presidential administrations. There have been many fine studies of pre-Reagan presidents and presidencies. But private ownership of presidential materials and the power to withhold information for excessively long periods of time has diminished our knowledge and understanding of several administrations.

For example, the recent release of new information about Woodrow Wilson's medical history held by the family of Admiral Cary Grayson, the president's White House physician, deepens our understanding of Wilson's illness during the last two years of his presidency and raises fresh questions about Wilson's capacity to govern. More information and fuller discussion of Wilson's incapacity might have spurred earlier

passage of the 25th Amendment to the Constitution addressing ways to deal with periods of presidential inability to discharge the duties and responsibilities of the office.

My access to John F. Kennedy's medical records during his administration raised additional concerns about the public's right to know about presidential health or, more to the point, about a president's capacity to govern effectively or deal with the great challenges that face every modern chief executive, particularly in the conduct of foreign affairs. We were fortunate that President Kennedy had the wherewithal to manage his physical problems or not allow his health issues to deter him from addressing national crises, including, above all, the Cuban Missile Crisis. Our current understanding of the various health issues that have plagued past presidents has made attentive citizens more mindful of the need to have fuller access to the medical conditions of aspiring presidents.

Access to the fullest possible record in the service of reconstructing the most substantial and honest history of presidencies is not some academic exercise that should be confined to university history departments. Rather, it can make a significant difference in shaping the national well-being. As John Dos Passos stated it, "In times of change and danger when there is a quicksand of fear under men's reasoning, a sense of continuity with generations gone before can stretch like a lifeline across the scary present."

In the Smith-Stern article, they quote Franklin Roosevelt's observation at the dedication of his Library in 1941. FDR said, "It seems to me that the dedication of a library is in itself an act of faith. To bring together the records of the past and to house them in buildings where they will be preserved for the use of men and women in the future, a Nation must believe in three things. It must believe in the past. It must believe in

the future. It must, above all, believe in the capacity of its own people so to learn from the past that they can gain in judgment in creating their own future."

I would only add to President Roosevelt's wise observation that without the fullest possible record, we diminish the possibility of creating a better future from our knowledge of the past.

Robert Dallek

March 1, 2007

Mr. CLAY. Yes, sir, it is very clear. Thank you for your testimony. I will go back to Mr. Nelson. Please proceed.

STATEMENT OF SCOTT NELSON

Mr. NELSON. Thank you, Mr. Chairman.

I provided my testimony in writing at great, and perhaps excessive, length. So I will also try to be brief.

First, I want to emphasize, as others have, that the PRA's intention was to expand access and make records available at the earliest possible time. That is language that we heard the Archivist himself invoke. To that end, it allowed a former President the categorical ability to restrict access to his materials only for 12 years.

Now, the act recognized the theoretical possibility that after that time, there might be a basis for a constitutional claim of Executive privilege. But it requires that in the absence of a valid constitutional claim, materials must be released upon request once that 12 year period has passed.

Now, prior to Executive Order 13233, the Archives had promulgated regulations and President Reagan had issued an Executive order that implemented a former President's ability to make a claim of constitutional Executive privilege, if he had one, but that properly provided there would be limited amounts of time for review and that if the Archivist determined that the claim was unfounded, the materials would be released as required by law.

The Executive order that President Bush issued in November 2001 turns that scheme upside down by providing that simply by claiming Executive privilege, a former President can direct the Archivist to withhold materials from the public, unless and until someone from the public who has requested them is able to go and get a court order requiring access.

It further gives the right to direct the Archivist, not only to a former President, but to representatives appointed by the former President's family, even after his death. It even gives the same privilege to a former Vice President, despite the absence of any constitutional basis for a Vice Presidential privilege.

And finally, as Mr. Blanton has explained, perhaps as significant as all these, it gives the former President the unlimited ability to extend the time for his review, so that materials can keep being withheld from the public simply by virtue of the fact that the former President has not completed his review and has not yet authorized access.

We filed a lawsuit challenging this order shortly after it was released in 2001. Throughout the history of that lawsuit, which remains pending to this day, it has been interesting that the government of the United States in defending the Executive order has principally tried to argue that the court shouldn't hear the case because, in their view, no one has been injured unless and until some former President claims privilege and documents are withheld, notwithstanding the lengthy delays in access that the order is already causing.

But the one thing that they have not done throughout the history of the lawsuit is argue that any of the features that we principally object to, namely the grant to a former President of a veto power over releases of his material, the grant of a similar power to rep-

resentatives of former Presidents, the grant of that same veto power to a Vice President, or the grant of unlimited review time—none of that have they ever argued is actually required by the Constitution.

That leads me to the conclusion that legislation overturning those features of the order is undoubtedly constitutional and within the power of Congress that the Supreme Court recognized in upholding the Nixon legislation to provide for procedures for access to the materials of a former President.

Having had the opportunity to review the legislation introduced today, it appears to me that it does overturn those features of the order that I have pointed to as being the most suspect constitutionally and legally, and that it would be undoubtedly constitutional.

Now, the best that we have heard in defense of the order today from the Archivist is that it has not been invoked yet; that the former Presidents have not vetoed the release of materials. They have only claimed privilege as to nine documents or 60 pages of material which leads me to the question: Why do we have these lengthy delays that have been associated with these reviews, if the end result is that, at the end of the day, claims of privilege are not even being made?

Second, what assurance do we have that in the future a future President, a former President once he leaves office, would not take advantage of this ability to veto the release of his materials, even if, under the pressure of litigation, it hasn't yet been exercised over the past 5 years of the history of this order?

If the best that can be said about this order is that it hasn't frequently been invoked, there seems to me to be little reason for the Congress to shrink from setting it aside.

[The prepared statement of Mr. Nelson follows:]

Testimony of Scott L. Nelson

Attorney, Public Citizen Litigation Group

Hearing on the Presidential Records Act and Executive Order 13,233
Before the Subcommittee on Information Policy, Census and National Archives
of the House Committee on Oversight and Government Reform

March 1, 2007

Good afternoon, Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify before you. My testimony concerns Executive Order 13,233, which purports to empower former presidents, former vice presidents, and the representatives of deceased or incapacitated former presidents and vice presidents to block the release of their records under the Presidential Records Act ("PRA" or "Act"). I first testified on this subject before another subcommittee of this Committee more than five years ago. Unfortunately, nothing has changed in the intervening five years. The Executive Order remains in place, and it remains unlawful for the reasons I outlined at that time. Most fundamentally, it violates the PRA—and exceeds the bounds of legitimate protection of executive privilege—because it gives a former president the power to veto public releases of materials by the National Archives even if the former president's assertion of privilege is not supported by the law.

Before I explain the basis for my conclusions, I would like to take a few moments to describe my background in this area of law. I am currently an attorney with the Public Citizen Litigation Group here in Washington. Public Citizen has long had an interest in ensuring public access to governmental records, including the materials of former presidents, and has been involved in much of the litigation that has established the governing legal principles in this area, including litigation over materials of former Presidents Nixon, Reagan, and Bush. My own experience in the area includes not only the five years I have spent litigating the validity of

Executive Order 13,233, but also approximately 15 years spent in private practice representing former President Nixon and, later, his executors, in litigation involving access to the Nixon presidential materials under the special legislation that governs those materials—legislation that is similar in many respects to the PRA. Some of that litigation also involved Public Citizen, and the principles established in that litigation are directly applicable to the issues posed by the new Executive Order.

1. **The Presidential Records Act.** The Presidential Records Act was enacted in 1978 to ensure permanent governmental control over presidential records and to broaden public access to them. In contrast to prior law, under which presidents were considered owners of all their papers, the PRA provides that presidential records are property of the federal government from the moment of their creation. Under the Act, they remain largely under the control of the president during his term in office. Once the president leaves office, however, the Act gives custody and control over the papers to the Archivist of the United States, and the National Archives and Records Administration ("NARA" or "the Archives") is responsible for processing the materials for release to the public under the Act.

Although the Act vests the Archivist with authority over presidential records, it does give former presidents the right to impose limited restrictions on public access to some of their materials. Specifically, the Act allows a president leaving office to direct that records falling within six specific categories may be kept secret for up to 12 years after the president's last day in office. The categories of materials that may be restricted include information that is properly subject to national security classification, information whose release would infringe an individual's right to privacy, and trade secrets. One of the categories, and the one most relevant for present purposes, encompasses confidential communications between the president and his

senior advisers—that is, communications that are potentially within the scope of "executive privilege."

During the first five years after a president leaves office, the Act provides that none of his records will be generally available to the public, to allow NARA to gain control over the materials, move them into a presidential library, and begin preparing them for public access. After the five years are up, any person may request access to presidential records, and the standards governing the request are generally equivalent to those under the Freedom of Information Act. Between year five and year 12, however, no records that fall within any of the 12-year restriction categories may be released.

After the 12-year restriction period ends, all the former president's records become available for release to the public under FOIA standards—including, with one exception, FOIA's exemptions. The applicability of the FOIA exemptions means, for example, that classified materials, which are categorically exempt from release under FOIA, are not subject to release under the PRA even after the 12-year restriction period ends.

The one FOIA exemption that does *not* apply under the PRA is so-called "exemption 5," which covers materials that are subject to the executive privilege and other legal privileges. Thus, when the 12-year PRA restriction period for materials reflecting confidential communications between the president and his advisers runs out, those materials will generally not fall within any statutory exemption from public release (assuming they do not relate to national security matters). This reflects Congress's judgment that 12 years will generally be long enough to protect records containing the deliberations of the president and his advisers. After 12 years, the drafters of the Act concluded, the interest in public access to the historical record

would outweigh any embarrassment or residual chilling effect that the prospect of disclosure of the White House decisionmaking process after such a lapse of time might entail.

To be sure, the Act provides that it is not intended to limit (nor to confirm or expand) any constitutionally based privilege that may be available to the former president, or to the incumbent. And, at some level, the executive privilege is constitutionally based. But the Supreme Court has also emphasized that executive privilege is subject to "erosion over time" after a president leaves office. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The congressional judgment underlying the PRA is that that erosion would be such that, after the passage of 12 years, there would be little (if anything) in the president's communications with his advisers that should legitimately remain secret. To the extent that there may be some presidential communications that would remain constitutionally privileged against public release even after a lapse of 12 years, the Act's recognition of the possibility that the former president may have a constitutional privilege to assert provides the necessary safety valve to prevent any possible claim that its provisions for public access are unconstitutional.

2. The Reagan Presidential Records. To avoid problems that might result from the retroactive application of the PRA, it was made applicable beginning with the president who took office on January 20, 1981. That turned out to be President Ronald Reagan. Before leaving office, President Reagan invoked the maximum 12-year restriction for all categories of materials permitted under the Act, including the category of communications between the president and his advisers. President Reagan left office on January 20, 1989, and thus the 12-year restrictions expired on January 20 of 2001, marking the first time in the history of the PRA that materials subject to the Act were available without regard to such restrictions—at least in theory.

Over the seven years preceding expiration of the 12-year restriction period, many requests for the release of Reagan presidential materials had been made at the new Reagan Presidential Library operated by NARA in Simi Valley, California. According to NARA estimates, over 4 million pages of records, from among the Library's total holdings of in excess of 40 million pages, had been opened to the public in response to those requests. From those files, however, NARA had withheld materials that were subject to the 12-year restriction imposed by President Reagan under the PRA. Among the materials withheld were about 68,000 pages that were withheld solely as communications between the former president and his advisers. In other words, these 68,000 pages were not subject to any other restriction (such as the restriction for materials that were national security classified).

When the 12-year restriction expired in January 2001, the 68,000 pages reflecting communications between the former president and his advisers were no longer subject to any limitation on public access under the PRA. Accordingly, NARA advised the White House in February of 2001 that it intended to release those materials to the public. NARA provided this notification as required by an Executive Order issued by President Reagan shortly before he left office. That Order (Executive Order No. 12,667) provided that before the Archives released such materials, it must give at least 30 days' notice to both the incumbent and the former president to give them the opportunity to assert any claim that a constitutionally based privilege would prevent release of the materials. Notably, the Reagan Executive Order contemplated that if a former president made a privilege claim, the records that were the subject of the claim could still be released by NARA if the Archivist (acting subject to the direction of the incumbent president) rejected the claim of privilege. In that event, it would be up to the former president to seek judicial relief if he continued to press his claim of privilege.

Following the White House's receipt of the Archives' notice of intent to release the 68,000 pages of Reagan records, then-White House Counsel Gonzales three times extended the time permitted for the incumbent president's review of the materials under the Reagan Executive Order. The stated purpose of these extensions was to provide the White House Counsel's Office time to review what Mr. Gonzales referred to as "many constitutional and legal questions" raised by the impending release of these materials under the PRA. Pending the White House's review, the 68,000 pages of records remained closed to the public for nearly ten months beyond the date when the restriction on their release under the PRA expired, even though no claim of a constitutionally based privilege had yet been made by the incumbent president.

3. **The Bush Order.** On November 1, 2001, the White House's review of "many constitutional and legal questions" culminated in the issuance of Executive Order 13,233 (the "Bush Order"), which purports to govern the implementation of the PRA and abrogates and supersedes the Reagan Order. The Bush Order sets forth procedures and substantive standards governing the assertion of claims of executive privilege by both former and incumbent Presidents following the expiration of the 12-year restriction period for materials involving communications between presidents and their advisers. The Bush Order has a number of troublesome features, which are described in detail below. The most striking of these is that it grants a former president the unfettered power to block the Archivist from releasing any materials to the public simply by making a claim of privilege (however unfounded that claim may be), leaving the burden on those who desire public access to challenge that claim in court.

The Bush Order not only reverses the burden of seeking judicial review, but also, in contrast to the PRA (which makes access to presidential materials after the 12-year restriction period has ended available under FOIA standards that do not require requesters to show a need

for access), asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding." Bush Order, § 2(c).

The Bush Order further provides that the Archivist must notify both the former president and the incumbent of any request for access to presidential records that are subject to the PRA, and must provide them with copies of the relevant records upon their request. Bush Order, § 3(a). The Order states that the former president shall review the records "as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome." Bush Order § 3(b). However, the Order goes on to provide that if the Archivist receives a request for an extension of time from the former president, the Archivist "shall not permit [public] access" to the materials, regardless of whether the former president's request is reasonable. *Id.* The Bush Order thus permits a former president to delay the release of materials indefinitely simply by requesting additional time to review them. Only after the former president has used whatever time he chooses to review the records must he advise the Archivist whether he "authorizes" access to the materials or whether he requests that some or all of the documents be withheld on the basis of a constitutionally based claim of privilege. Bush Order, § 3(c).

The Bush Order further provides that either concurrently with or after the review by the former president, the incumbent president has an unlimited amount of time to review any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d). The Order states that, upon completion of the incumbent's review, the incumbent is to decide whether he "concurs in" the former president's decision either to "request withholding of or authorize access to the records." Bush Order § 3(d). The Order tilts the scale in favor of secrecy

by providing that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" and "will support" a former president's privilege claim "in any forum in which the privilege claim is challenged." Bush Order § 4.

When the incumbent president "concurs in" a former president's request that materials be withheld on privilege grounds, the Order provides that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both presidents change their minds or a court orders that the materials be released. Bush Order § 3(d)(1)(i). (Such a court order could only come about if a requester sued for access, since nothing in the PRA would permit the Archivist to sue the former president or the incumbent to require that materials be released.)

Moreover, even when the incumbent president has found that there are "compelling circumstances" that require him to *disagree* with a former president's request that materials be withheld on grounds of privilege, the Bush Order provides that the Archivist is still forbidden to disclose the assertedly privileged materials to the public, "[b]ecause the former President independently retains the right to assert constitutionally based privileges." Bush Order, § 3(d)(1)(ii). Under such circumstances, the Bush Order provides that the Archivist must deny public access to the materials claimed to be privileged by the former president unless and until the incumbent president informs the Archives that both he and the former president agree to their release, or there is a final, nonappealable court order requiring that the records be released.

The Bush Order also provides that when the former president has "authorized access," the Archivist must nonetheless deny public access to records when the incumbent president so directs. Bush Order § 3(d)(2)(ii). Only when both the former president and the incumbent president "authorize access" does the Order permit the Archivist to grant public access to

presidential records under the PRA. The Bush Order also forbids the Archivist to make presidential records available in response to judicial or congressional subpoenas unless both the incumbent and former presidents "authorize access" or there is a final, nonappealable court order requiring access. Bush Order, § 6.

In addition, the Bush Order purports to authorize private citizens other than a former president to assert constitutionally based privileges on behalf of a former president after he dies or when he is disabled. The Order provides that a former president may designate such a representative (or representatives) "to act on his behalf for purposes of the Presidential Records Act and this order." Bush Order, § 10. Upon the former president's death or disability, such a designated representative "shall act" on the former president's behalf, "including with respect to the assertion of constitutionally based privileges." *Id.* If the former president fails to designate such a representative, the Order provides that his family may do so. *Id.*

Finally, under the Bush Order, former vice presidents have the same right to assert purported claims of constitutionally based *vice presidential* privilege that former presidents have to assert claims of presidential privilege. Bush Order, § 11. Assertions of privilege by former vice presidents, like assertions of privilege by former presidents, must be honored by the Archivist regardless of their merit absent a court order.

4. The Bush Order's Legal Flaws. The Bush Executive Order is fundamentally flawed—legally, constitutionally, and as a matter of policy. To begin with, the Bush Order is unauthorized. The PRA does not give the president the authority to issue implementing directives through the fiat of executive orders. Rather, it provides that the Archivist is to implement it through regulations issued through the notice-and-comment process established by the Administrative Procedure Act. The Archivist has done so, and the governing regulations,

which remain in place, are incompatible with the Bush Order in that they not only place limits on the time in which a former president may assert a claim of privilege (unlike the Bush Order, which gives a former president or his representative the unilateral authority to take as much time as he pleases to review records the Archivist proposes to release), but also require the Archivist not to defer automatically to a former president's claims of privilege, but rather to release records in the face of such a claim if the Archivist determines that the claim is improper. *See* 36 C.F.R. § 1270.46. An executive order cannot override duly promulgated regulations issued pursuant to statutory authority.

Moreover, although the Bush Order was described by administration officials upon its release as merely establishing a procedural mechanism for the assertion of privilege claims, the Reagan Executive Order that the Bush Order supersedes already provided more than adequate *procedures* for the assertion of privileges. What the Bush Order adds are new and improper substantive standards that displace and subvert the PRA's provisions for public access to presidential materials.

It must be remembered that the PRA is based on the concept that a president leaving office can impose only a 12-year restriction on materials reflecting communications with his advisers. Thereafter, those materials are presumptively open to the public unless they involve national security matters or other specific content exempt from disclosure, or unless they fall within the small category, which steadily diminishes with the passing of time, of materials that are subject to a constitutionally based privilege of the former or incumbent president. Thus, to the extent that the Bush Order imposes standards that extend the secrecy of such materials beyond the PRA's 12-year limit, it is lawful only if those standards are constitutionally required. Clear judicial precedent indicates that they are not.

The most plainly improper feature of the Bush Order is its requirement that the Archivist withhold materials from the public whenever the former president has asserted a claim of privilege, *even if the incumbent president disagrees with that claim.* The Bush Order claims to find authority for this requirement in the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which held, among other things, that a former president retains a limited right to assert executive privilege independently from the incumbent president. Although the Court recognized this right, it also emphasized that the protection afforded historical presidential records was limited and eroded steadily as time passed. Thus, while recognizing a former president's right to *assert* a claim of privilege, the Supreme Court by no means implied that all such claims were valid or that incumbent executive branch officials were bound to honor such claims regardless of their merit. Rather, the implication of *Nixon v. Administrator* was that although former presidents could make claims of privilege, the Constitution permits such claims to be evaluated and rejected by current executive branch officials when, as is usually the case, the public's need for access to historical materials involving official government actions outweighs the former president's attenuated interest in confidentiality after he has been out of office for a number of years.

These implications of *Nixon v. Administrator* were made explicit by the United States Court of Appeals for the District of Columbia Circuit a few years later in its decision in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988). That case concerned a directive by the Reagan Justice Department that closely parallels the terms of the Bush Executive Order. The Justice Department directive at issue in *Public Citizen v. Burke* instructed the Archives that it must defer to any claim of privilege asserted by former President Nixon to block public release of any of his presidential materials, which are held by the Archives under legislation that is applicable only to

President Nixon but is similar to the PRA in its provisions encouraging public access to presidential records. The Justice Department argued that such deference was constitutionally required to protect the former president's ability to assert privilege claims under *Nixon v. Administrator*.

In an opinion written by Judge Silberman and joined by Judge Sentelle and the late Judge Harold Greene, the D.C. Circuit roundly rejected the Justice Department's view. The court held that the Archivist, as an executive branch official obligated to assist the incumbent president in fulfilling his constitutional duty to take care that the laws be faithfully executed, could not permissibly defer to a former president's claim of privilege if the claim was not legally proper. Thus, the court held, the Archivist (and the incumbent president) was obligated to assess independently a former president's assertion of privilege, to reject the claim if it were not well founded legally, and to release materials to the public as required by the statute if the privilege claim were rejected. The court further rejected the government's assertion—again echoed in the Bush Executive Order—that it is permissible for the Archivist to rubber-stamp a former president's privilege claim as long as a member of the public can challenge it in court. The court stated: "To say ... that [the former president's] invocation of executive privilege cannot be disputed by the Archivist, a subordinate of the incumbent President, but must rather be evaluated by the Judiciary in the first instance is in truth to delegate to the Judiciary the Executive Branch's responsibility" to carry out the law. 843 F.2d at 1479.

The reasoning of *Public Citizen v. Burke* applies fully here, and the Bush Executive Order is plainly incompatible with it. Under the PRA, the Archivist is *required* to make materials available to the public after the expiration of the 12-year restriction period, *unless* there is some valid constitutionally based privilege that bars their release. By compelling the Archivist

to withhold release of materials whenever the former president makes a claim of privilege, regardless of its legal merit, the Bush Executive Order, like the Justice Department directive struck down in *Burke*, allows current executive branch officials (including the incumbent president) to abdicate their responsibility to conform their actions to the law. Indeed, by requiring materials to be kept secret *even when the incumbent president disagrees with a former president's claim of privilege*, the Bush Order explicitly requires the executive branch to take actions the president has determined are *not* legally justified, in violation of the constitutional duty to execute the law faithfully and in defiance of the PRA. Moreover, the Bush Order goes so far as to bind the administration to support the former president's privilege claims in court even when it disagrees with them—an extraordinary abdication of the executive branch's obligation of fidelity to the law. In these respects, the Bush Order is even more obviously unlawful than the Justice Department directive at issue in *Burke.*

Another respect in which the Bush Order departs from the terms of the PRA and from judicial precedents involving access to presidential historical materials is in its apparent insistence that a person requesting access to presidential materials must, even after the Act's 12-year restriction period has expired, show some specific, demonstrable need for access to overcome executive privilege. This requirement is a departure from the plain terms of the PRA, which makes such materials available under FOIA standards—standards that do not require the showing of any specific need. See 44 U.S.C. § 2204(c)(1). Moreover, the Order conflicts with another ruling of the D.C. Circuit in litigation over the Nixon materials, *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982). In that decision, the Court of Appeals specifically rejected the argument that the constitutional privilege requires persons seeking access to presidential historical materials years after the president leaves office to show a specific

need for access. Id. at 359. Because the privilege erodes with the passing of time, the court held that it was proper for the Archives to open materials to all comers, without a showing of need, and to place the burden on the former president to establish that particular disclosures would violate the privilege. That is exactly what the Presidential Records Act is designed to do. The new Executive Order, by contrast, turns the Act's requirement of public access on its head.

These are not the only features of the Bush Order that are unlawful. The Order's provision that the constitutional executive privilege may be asserted by a deceased or disabled former president's family or personal representative is fundamentally at odds with the principles underlying the privilege. The privilege is not, after all, a personal right of the former president. He is authorized to assert it solely on behalf of the branch of government that he once headed. His family members or designees have no such claim of authority. The Bush Order nonetheless grants these private citizens the power to *direct* the Archivist to withhold from the public records whose release is otherwise required by law. By delegating to private citizens the power to assert a governmental privilege to which they have no legitimate claim and to dictate to a government official how he must carry out his responsibilities, the Order not only expands the privilege beyond all legitimate bounds but abdicates the executive branch's own constitutional responsibility to see that the laws are faithfully executed.

Equally unsupportable by law is the Order's de facto creation of a vice presidential privilege, a previously unknown legal concept. The Order explicitly provides that a former vice president may assert a privilege of his own, and that the Archivist must defer to such a claim of privilege. (The Order makes clear that the privilege in question is a vice presidential privilege, because it provides that a former vice president may *not* assert a claim of presidential privilege. Bush Order, § 11(b).) The considerations that led the Supreme Court to recognize the existence

of a constitutional presidential privilege, all of which relate to the fundamental importance of the duties the Constitution assigns to the president, are inapplicable to the vice president, whose constitutional duties are few and do not require that he have the ability to obtain confidential policy advice independent of the president. To the extent the vice president functions as an adviser to the president, their communications may fall within the scope of the president's privilege. But there is no basis for the Bush Order's recognition of a separate privilege held by a vice president, nor for the Order's delegation to former vice presidents of the power to direct the Archivist to withhold materials from the public by the mere assertion of this fictitious privilege.

5. The Bush Order Is Bad Policy. Beyond its legal flaws, the Bush Order threatens to subvert significantly the policies underlying the PRA. The PRA's premise is that public access to historically significant presidential records is desirable and that, once a decent interval has passed after a president leaves office, the grounds for restricting public access should be quite limited.

The Bush Order represents a substantial threat to the PRA's fundamental goals. First, it creates the possibility that a former president may indefinitely delay access to records while he simply *considers* whether to assert a claim of privilege. Second, it permits him to declare large blocks of the materials off-limits to the public merely by asserting a claim of privilege, which the Archivist must respect however unfounded it may be, and which may only be challenged in court by a requester who can show a specific, demonstrable need for access (whatever that means).

One need not believe that the representatives of a former president will consciously act in bad faith to bar access to their materials to be concerned here. With the ability to block access comes the temptation to use it, particularly when records that are (or may be) embarrassing to a former president or his close associates are at stake. It is easy in such a situation for a former

president to confuse his own personal interest in denying access with an institutional executive branch interest that might support a claim of privilege. And experience teaches time and again that, given the chance, officials often err on the side of over-withholding materials and asserting interests in secrecy that, upon inspection, are without justification. For these reasons, it is a bad idea to give former presidents carte blanche authority to direct the Archivist to withhold materials from the public. And since this bad idea is plainly not constitutionally required, there can be no justification for enshrining it in an executive order.

Nor can the Bush Order's expansion of the secrecy of historical presidential records be justified, as some in the administration suggested at the time of its promulgation, on the basis of national security concerns. Even without the new Order, the Presidential Records Act and existing Executive Orders on national security classification provide ample authority to prevent the release of materials that could potentially damage national security. Simply put, the Act already provides protection to properly classified information even after the expiration of the 12-year restriction period, and it will continue to do so with or without the Bush Order. See 44 U.S.C. §§ 2204(a)(1) & (c)(1).

The Bush Order extends the secrecy not of information relating to national security, but of materials relating to communications between the former president and his advisers that do *not* implicate national security. The 68,000-some pages of Reagan materials that the Archives notified the White House it was prepared to release in February 2001, for example, were materials that were not subject to protection for national security reasons (or to restriction under any of the other categories that survive the 12-year limit under the Act). Rather, they had been withheld from release solely because they reflected communications between the former president and his advisers that were subject to the 12-year restriction. The Bush Order would

allow the former President (or the incumbent) to impose an indefinite, blanket ban on release of these materials even though they contain *no* sensitive national security information.

In addition, national security reasons can provide no possible justification for the Order's provisions that effectively give a former president veto power over the release of materials by the Archivist. It is the incumbent president, not his predecessors, who has the constitutional power and duty to make judgments about the nation's security needs. If the incumbent president sees no national security justification for keeping particular materials secret, there can be no reason to allow a former president to override that determination.

In the final analysis, what the Bush Order reflects is a fundamental change in the PRA. The PRA is premised on the notion that the public is *entitled* to access to historical presidential materials subject only to defined exceptions set forth in the statute. Only for a limited, 12-year period is that access subject to restrictions imposed by the will of the former president. After the 12 years expire, the only limits are those imposed by the statute or, in rare cases, by constitutional doctrines of privilege.

The Bush Order reflects another model entirely. It is an attempt to resurrect the pre-PRA regime in which access to presidential materials was controlled by the former presidents (usually through restrictions in the deeds of gift through which the former presidents donated their materials to the public). Thus, the Bush Order repeatedly states that the public will be permitted access to materials only if the former president and the incumbent decide to "authorize" access.

That is not what the PRA is all about. Under the PRA, it is the statute that "authorizes" public access, whether the former president (or the incumbent) approves or not. Only in the exceptional circumstances where the former or incumbent president has a legally enforceable,

constitutionally based privilege can the access authorized by the statute be denied. The Bush Order is incompatible with this statutory scheme. It is bad policy and bad law.

6. The Litigation over the Bush Order. In December 2001, Public Citizen and a number of other organizations and individuals filed suit against the National Archives and Records Administration in the U.S. District Court for the District of Columbia, seeking declaratory and injunctive relief to prevent the Archivist from carrying out the executive order. The lawsuit, *American Historical Association v. National Archives & Records Administration*, No. 01-2447, remains pending and unresolved today.

From the outset, the strategy of the Justice Department in defending the lawsuit has been to avoid adjudication of the merits of the legal challenges to the executive order by arguing that the claims are not ripe, that the plaintiffs lack standing, and even that the claims are moot. Thus, soon after the lawsuit was filed, the Archives began to release some of the 68,000 pages of Reagan records that had been withheld until that point, and the Justice Department used the release of the materials to argue that the plaintiffs were not really injured by the Bush Order. Even with the impetus of the administration's desire to derail our lawsuit, however, the reviews required by the Executive Order for the 68,000 pages of records took until late July 2002 to complete, so that the release of those records was ultimately delayed by 18 months beyond the statutory 12-year period that had ended in January 2001. Meanwhile, we discovered that another 1654 pages of Reagan records that should have been noticed for release in January 2001 had been omitted by the Archives from its notice of intent to release records at that time because of concerns that the documents might be particularly sensitive to former President Reagan. We requested that those documents be released as well, but as a result of the Bush Order, reviews of the documents delayed their release for another 18 months, until January 2004.

While the process of releasing the documents dragged on, the parties completed briefing on the merits of our challenges to the Executive Order in the spring of 2002. We moved for summary judgment on our claims that the Order violated the PRA and exceeded the proper bounds of the constitutional privilege; the government contested our motion and filed its own motion to dismiss based on its claim that the suit was not ripe and/or that the plaintiffs lacked standing until such time as a former president actually asserted privilege under the Order and documents were withheld as a result. In response to those arguments, we pointed out that the Order was being applied to withhold or delay release not only of the 68,000 pages of records (and the 1654 pages of newly discovered documents), but also, on an ongoing basis, of every presidential and vice presidential record that anyone requested from the Ronald Reagan and George Bush Presidential Libraries, all of which were subject to review under the terms of the Bush Order, and all of which were being withheld until such time as the former officeholders authorized release.

In April 2003, approximately a year after the completion of the briefing in the district court, we received notice that as a result of the Reagan representative's review of the 1654 pages of records referred to above, the Reagan representative was asserting a claim of privilege as to 11 documents. After almost another nine months, in January 2004, the White House announced that the President would defer to that assertion of privilege; thus, under the terms of the Bush Order, the Archivist would be obliged to withhold the records. Shortly thereafter, we were informed by the Archives that the documents were indeed being withheld, and we received a formal, final notification from the Archives that it would not release the records because of the Bush Order on April 1, 2004.

Meanwhile, on March 28, 2004, the district court issued an order dismissing the case on ripeness and standing grounds. The court's holding was premised on the understanding that the release of the 68,000 pages of Reagan records that had originally been withheld in January 2001 had effectively resolved the issue, and that there was no further relief that the court could provide. The court's decision in this regard reflected its understanding that the Order was not currently being applied to delay or withhold access to any presidential or vice presidential records other than the 68,000 pages that had already been released.

We sought reconsideration of the court's order on the ground that it overlooked that the Bush Order was being applied on an ongoing basis to records at the Reagan and Bush Libraries that the plaintiffs had requested, and that it was causing, at a minimum, months of delays in access to records. In addition, we pointed out that, as of April 1, 2004 (only days after the court's ruling), the Order had been relied on by the Archives as a basis for withholding the 11 records as to which the Reagan representative had claimed privilege. The government conceded both points.

As a result, the court permitted us to amend our complaint to challenge the withholding of the 11 documents and to submit a new round of briefing. While the briefing process was in midstream, in September 2004, the White House announced that President Bush had given further consideration to the 11 documents and had determined that, as to nine of them, he would independently claim privilege (as opposed to merely deferring to the Reagan representative's claim of privilege). The White House further announced that the Reagan representative had withdrawn the claim of privilege as to the other two documents, so they would be released by the Archives. As a result, the withholding of the nine remaining documents was no longer based on the former president's unilateral claim of privilege and thus did not depend on the lawfulness of

the Bush Order's provisions requiring the Archivist to comply with a former president's privilege assertion. With respect to those particular documents, therefore, the parties submitted briefs solely on the question whether the incumbent's claim of privilege was valid. (The parties also renewed their cross-motions on the question of the validity of the Bush Order, relying on arguments that had already been presented to the court in earlier briefs.)

In September 2005, the district court issued a ruling on the nine documents, holding that President Bush's claim of privilege with respect to them was valid and required that the documents be withheld unless the plaintiffs could show a special need for access to them. The court held that the erosion of the privilege due to the passage of time, and the congressional judgment in the PRA that a 12-year period was presumptively sufficient to protect the confidentiality of presidential advice, did not eliminate the requirement (based on the Supreme Court's decision in the Nixon tapes case) that a special need similar to the grand jury's need for evidence be shown to overcome a president's claim of privilege.

At the same time, however, the court granted the plaintiffs' motion that it reconsider the March 2004 order dismissing the challenge to the validity of the Bush Order, which had been based on the factually erroneous premise that the Order was not being applied to records sought by the plaintiffs on an ongoing basis. The court ordered that the parties submit new briefs on the merits of the challenge to the Bush Order (as well as on the government's motion to dismiss on standing and ripeness grounds) to ensure that the court had up-to-date information in light of any changes in factual circumstances that had occurred since the original briefing in 2002 and the briefs that had been submitted in 2004.

The parties complied with the court's directive and submitted new briefs and updated factual information concerning the application of the Bush Order, a process that was completed

by the submission of our final reply brief in January 2006. As we explained to the court in our papers, the government had continued to apply the Bush Order to all new requests for release of records from the Reagan and Bush Presidential Libraries, resulting in months-long delays in access as requesters awaited authorization from the representatives of the former officeholders before records were released. In addition, just as the Bush Order had delayed the release of tens of thousands of pages of Reagan documents after their 12-year restriction period expired in January 2001, it was also holding up the release of tens of thousands of pages of records of former President Bush, whose 12-year restriction period under the PRA had expired on January 20, 2005. As of that date, an estimated 57,000 pages of Bush presidential records (as well as several thousand pages of Quayle vice presidential records) had been kept secret because they involved confidential communications with advisers. Although that restriction had expired, all of those thousands of pages of documents were withheld pending review under the Bush Order. By the end of October 2005, nine months after the expiration of the statutory restriction period, only about half of those documents (a little more than 30,000 pages) had been released. The remainder were still being withheld when our briefing process was completed in January 2006, a year after the PRA restrictions expired. (The remaining documents were finally released in April and August 2006, over 18 months after the PRA called for them to be available.)

That is where the litigation currently stands. The case has been fully briefed by both parties since early 2006 and could be decided at any time. Of course, the district court is not under any obligation to rule at any particular time, and whichever way it rules, an appeal will likely follow. Thus, although we remain confident that our legal arguments will ultimately prevail, the litigation does not promise to put the issue to rest in the immediate future.

7. What Can Be Done? Throughout the more than five years of litigation over the Bush Order, the Justice Department has persistently argued that the court should not reach the merits because, in its view, the Order has not yet harmed the plaintiffs even though the privilege reviews that it authorizes have concededly added many months to the delays in releasing presidential records. At the same time, the government has argued that the Order is a permissible exercise of the president's authority to direct the Archivist with respect to the implementation of the PRA. But one thing that the government has *not* argued is that any of the principal features of the Order to which we object—the power it gives former presidents to veto releases of their records by the Archivist, its authorization of privilege claims by representatives of deceased or incapacitated former presidents and their families, and its de facto recognition of a vice presidential privilege—is constitutionally *required* by the nature of the presidential privilege or the principles of separation of powers.

Thus, the government, throughout the litigation, has effectively conceded that legislation abrogating these features of the order would be constitutional exercise of Congress's power to regulate the disposition of presidential records (a power recognized by the Supreme Court in *Nixon v. Administrator of General Services*, *supra*). Similarly, nothing in the Constitution can be said to require that former presidents and their representatives be given an unlimited amount of time to review materials proposed for release by the Archives. Legislation addressing these features of the Bush Order would go a long way toward restoring the PRA to its original intent, eliminating the lengthy delays that have accompanied privilege reviews called for by the Bush Order, and preventing the threat that former presidents may arbitrarily direct the Archivist to withhold access to their materials.

The best that can be said of the Bush Order is that it has so far not been invoked by former presidents or vice presidents to direct the outright withholding of large numbers of records from the public. But that is hardly a reason not to act to override it. To begin with, the pendency of the litigation, and the government's strategy of avoiding the merits by arguing that the case is not ripe unless and until records are finally withheld based solely on a claim of privilege by a former president or vice president (or his representative), no doubt accounts for the hesitancy of former officeholders to make claims that would undermine the government's defense of the Order. Moreover, even in the absence of claims of privilege, the Order imposes huge burdens on the process of releasing documents under the PRA by saddling it with lengthy delays that frustrate the legitimate needs of the public for timely access. The small number of actual claims of privilege that have so far been made only underscores how pointless those delays have been.

Finally, that the Order has not so far led to a great number of assertions of privilege by former presidents does not mean that it will not do so in the future. The representatives of former Presidents Reagan and Bush may have been circumspect so far in claiming privilege, but that says little about what might happen if, for example, the current President Bush and Vice President Cheney, who have made clear their obsession for secrecy and control over information, were permitted to invoke the terms of the Order after they leave office. The very point of the Order is to allow former officeholders to control access to their records beyond the 12-year statutory restriction period, and there seems little doubt that if it is left in place, someone will eventually take advantage of that control.

To be sure, the issue will not arise with respect to President George W. Bush and Vice President Cheney until some years after they leave office in January 2009. By that time, the

Order may well be withdrawn by President Bush's successor if it has not been struck down by a court. But that is no reason for Congress to accept the distortions and delays that the Order is already injecting into the process of releasing presidential records under the PRA, nor should Congress be content to hope that someone else addresses a problem that it has the power to fix now. I urge Congress to exercise its authority to pass legislation abrogating Executive Order 13,233 and restoring the PRA to its intended functioning.

Mr. CLAY. Thank you for that summarized testimony, Mr. Nelson.

Dr. Nelson, we will go to you. Are you ready?

STATEMENT OF ANNA K. NELSON

Ms. NELSON. The problem, of course, is that being No. 4, I am going to reiterate and try not to repeat.

I am Anna K. Nelson, and I am the distinguished historian in residence at American University. I have done research in five Presidential libraries and the Nixon Presidential papers, as well as the National Archives. I would like to add that I was also a staff member of the Public Documents Commission, which was formed after Watergate. It was a commission to study what should happen to the records of government. The Presidential Records Act emerged from that Public Documents Commission the following year. I guess that means I have been in it a long time.

Today, I would also like to represent a group that uses the Archives and Presidential libraries more than almost any other group, and that is the Society for Historians of American Foreign Relations. We are big users of the Archives and Presidential papers.

Mr. Chairman, it was no accident that Roosevelt established both the first Presidential library and the Executive Office of the President. The proliferation of New Deal and World War II agencies moved the records of the President from a collection of personal letters, such as those found in the Library of Congress, to a unique set of government records, no longer all seen by the President.

It took about three decades for the Congress to respond to this increasingly dramatic change, because Presidents willingly donated their records. It was Richard Nixon's attempt to hide and control his records, then, that finally brought into existence the PRA.

Now, I agree with everyone that the two most important provisions of the act were to ensure the protection of the records and to ensure that the records would be open to the public in a reasonably short period of time. Equally important to the PRA was that it removed the decision of access from the heirs of the Presidents and gave it to the Archivist of the United States.

In establishing a time for disclosure, Congress gave the President 12 years before his records were available. There are a lot of other safeguards, national security safeguards, personnel, privacy etc. With these exemptions, Congress I think thought that it had duly protected the former Presidents, but obviously President Reagan and President Bush did not agree and decided the records needed additional protection.

The revision of the original Reagan amendment to the PRA did not come to public notice until 12 years after the Reagan Presidency, because of course the records were still tied up. When the Bush administration, however, took 9 months to make their decision on the Reagan records and continued to delay their release, why, it certainly came to our attention. Their solution to the Reagan issues was to issue their own revision, Executive Order 13233, which simply instituted more restrictions and also more delays.

They gave back to the heirs of the Presidents the right to make decisions on access. The defenders of the Bush Executive order note that, except for an original delay, the Reagan records are being released. The Archivist told us that this morning, but that is entirely beside the point. Presidential records are now vast collections. We have heard that. They have grown exponentially with each President. There were 27 million pieces of paper in the Reagan Library; 64 million in the Clinton Library, of which 12 million are classified. This is a veritable tsunami of paper, and it must be processed and opened by understaffed libraries.

It will take far more than 25 years for all the records to be released. In 2030, if the President is no longer alive, should Presidential families or executors of his estate make decisions about releasing government records, records that illustrate public policy that are paid for by taxpayers? Should the incumbent President in 2030 have the authority to close or release the papers of a former President? This was clearly expressed in a headline in the Washington Post recently: "Clinton papers release to be Bush's decision." Supporters of the Executive order argue that it is merely procedural, but it is far more than that.

I would like to expand just a minute, foreclosing on something that Dr. Dallek said, and that is the importance of records. Why should we find it important? Being a country at war with major issues, I think we need to think of Presidential papers as raw material, like iron ore, for the specialized books and articles of the researchers. These ideas and conclusions, then, are refined and become subjects of very influential books and articles that the public reads, and in that way trickles into the public view of where we are, iron to steel, perhaps.

Ultimately, these items enter textbooks. So it doesn't matter how few the researchers; the books are important that are written from these papers. You can just start to, and yes, I could spend 5 minutes, which I won't, on listing them, but the American Library Association has 43 books on their list that would be actually harmed by this provision if the provision had been in effect.

And it is not difficult, I think, to discern that through this Executive order Bush can not only control his own papers, but the records of his father and also the Reagan administration.

The United States is now a global power. The records produced by the White House have become more important to American history than ever before. Congress passed this Presidential Records act so the American people could learn about their past and Congress acted very wisely. Executive Order 13233 should not be allowed to nullify that act.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Nelson follows:]

Testimony
Of
Anna K. Nelson
Subcommittee on Information Policy, Census, and National Archives
Committee on Oversight and Government Reform
March 1, 2007

My name is Anna K. Nelson. I am the Distinguished Historian in Residence at American University in Washington, D.C. I have done research in five presidential libraries, Roosevelt, Truman, Eisenhower, Kennedy and Johnson and in the Nixon Presidential Papers. I have also done extensive research in the National Archives in Washington. I was a staff member of the Public Documents Commission, 1976-77 which was partly responsible for the passage of the Presidential Records Act. From 1994-1998 I was a presidential appointee to the John F. Kennedy Assassination Records Review Board.

Today I am representing the Society for Historians of American Foreign Relations, whose members are among the most active users of presidential libraries and government records.

It was no accident that Roosevelt established both the first presidential library and the Executive Office of the President. The proliferation of New Deal and World War II

agencies moved the records of the President from a collection of personal letters such as those found in the Library of Congress to a unique set of government records.

It took about three decades for the Congress to respond to this increasingly dramatic change because presidents willingly donated their papers after leaving office. It was Richard Nixon's attempt to hide and control his records that finally brought into being the Presidential Records Act (PRA) in 1978.

The two most important provisions of the Act were, first, insuring the protection of these records so that they could not be destroyed; second, to insure that records of former presidents would be open to the public within a reasonable period of time. Equally important were the provisions that removed decisions of access from the heirs of the presidents to the Archivist of the United States.

In establishing a time for disclosure, Congress gave the president twelve years before his records became available to the public. Other safeguards in the Act protected certain categories of records including National Security Records and deliberately excluded any diaries or private political papers. With these exemptions, Congress felt that it had duly protected each former president.

Unfortunately, former President Ronald Reagan and now President George W. Bush decided that records needed additional protection before becoming public. Reagan's Executive Order (EO12667) required the U.S. Archivist to notify both the former and incumbent president when in his judgment, records were about to be released that could be protected by executive privilege. Either could then invoke executive privilege if they found records they did not wish to open. The incumbent president was given 30 days to make his decision.

This revision of the PRA did not come to public notice until 12 years after the Reagan presidency, when the Bush administration took 9 months to make their decision and continued to delay the release of Reagan records. Their solution to the problem was to issue EO 13233, which instituted more restrictions on release. Under this order, the past president has 90 days and the incumbent no limit of time to examine the documents to be released. Executive privilege has been further defined and provision made for the heirs or representatives of the former president to continue the process, presumably for years to come. Thus the EO overturns important access provisions the Congress deliberately provided in the PRA.

Defenders of the Bush E.O. note that except for an original delay, the Reagan records are being released. But that is entirely beside the point. Presidential records are now vast collections that have grown exponentially with each president. There are over 27 million pieces of paper in the Reagan library and over 64 million in the Clinton library (of which 12 million are classified). This veritable tsunami of paper must be processed and opened by understaffed libraries. It will take far more than 25 years for all the records to be released. In 2030, if the president is no longer alive should presidential families or executors of his estate make decisions about releasing government records - records illustrating public policy and paid for by the taxpayer? Should the incumbent president in 2030 have the authority to close or release the papers of a former president as expressed in a headline in the *Washington Post*, "Clinton Papers Release to be Bush's Decision?"

Supporters of the EO argue that it is merely a procedural addition to the Presidential Records Act, but it negates important parts of that Act. While the purpose of the Act was to provide greater and rapid access, the E.O. encourages delay since the incumbent and past president are not bound by the time restrictions as they peruse

documents. Finally, broadening the definition of the president's constitutional privileges and allowing their closure will remove most of the records of the confidential advice a president receives. In other words it will have the potential to remove the core policy-making documents from the president's collection.

The country is at war and major domestic issues loom ahead, why should the Congress and the public care whether a few thousand researchers have access to these records?* Perhaps for those very reasons we need reasonable access to the documents that have shaped our history.

We should think of the presidential papers as raw material for specialized books and articles. The ideas and conclusions gained by these few researchers are refined and become subjects of influential books and articles and ultimately the textbooks that educate our students. Policy makers read these books and articles and are educated by the new insights gained through research in records.

Books on the Cuban Missile crisis based on presidential records have taught us about presidential decision making and the dangers of great power confrontations. When one collection of President Richard Nixon's records was promptly opened in the 1980's we

* There were 11,564 daily visits to research rooms in presidential libraries in 2006.

learned much more about the creation of the first agency entirely concerned with the environment. Even records over fifty years old can still be useful. Many books on the issues of the civil rights movement confronting President Dwight D. Eisenhower elucidate the inherent problems in that struggle. Similarly, President Eisenhower's frustrating attempts to ameliorate the Israel/Palestine issue also provide many insights for the present. Unfortunately, delaying the release of records does not delay the memoirs and self-serving books that fill the gap. Kissinger records in the Nixon presidential papers often dispute Henry Kissinger's two volume memoir. You need only contrast the books written before records are released with those written afterward, to see the importance of presidential records.

It is not difficult to discern that through this EO, President Bush, once he leaves office, can not only control access to his important policy making records but those of his father, as well as those records from the Reagan administration that might be of concern to members of his administration. But the problems with this E0 go beyond the current president.

The United States is now a global power. The records produced by the White House have become more important to

American history - indeed, World History - than ever before. Congress passed the Presidential Records Act so that the American people could learn about their recent past. Congress acted wisely. Executive Order 13233 should not be allowed to nullify that Act.

Mr. CLAY. Thank you so much for your testimony.
Mr. Hensen, finally, you may proceed.

STATEMENT OF STEVEN L. HENSEN

Mr. HENSEN. Thank you, Mr. Chairman.

Happily, I think that my remarks will echo much of what has been said here. It is nice to know the Archivists are pretty much in agreement with historians.

My name is Steven Hensen. I have been an Archivist and librarian for more than 35 years. I have worked at the State Historical Society of Wisconsin, Yale University, the Library of Congress, the Research Libraries Group, and for the past 20 years at Duke University.

Today, I am representing the Society of American Archivists, the world's largest organization of professional Archivists, with more than 4,800 members throughout the United States and more than 20 countries. I have been a member of that society since 1971, and I served as its President in 2001 and 2002.

Those of us who labor in the Nation's archives are entrusted with ensuring that citizens, scholars and students have access to the records of human society and culture. We are professionals who serve a vital role as gatekeepers to the history of our civilization through responsible keeping of the public record. The records we preserve make the government more accountable and responsive to its citizens. And in democracies like our own, at least, reasonable public access to the records of government help to ensure that we remain a Nation of laws, and not of men.

In keeping with our principles, including our commitment to the integrity of records and their accessibility, and in light of the ethical consequences stemming from them, the Society of American Archivists has spoken out frequently when public officials have sought to delay or deny access to the records. It is particularly troubling, then, when the highest officer in our government, the President, attempts to exert improper and illegal control over access to his records.

In November 2001, the White House issued Executive Order 13233. What was immediately clear to us Archivists is that the order does not in fact further implement the act as its title said. Rather, it abrogates the core principles of the act and violates both its spirit and letter. Where the Presidential Records Act provides for the orderly and archivally sound management of Presidential records, with the final authority residing appropriately with the Archivist of the United States, the President's order places ultimate responsibility for decisions regarding access with the President and, indeed, with any sitting President in the future, and most egregiously with ex-Presidents and members of an ex-President's family.

The written testimony that we have submitted explains this more fully, as testimony from the other panelists has indicated.

Although the White House has argued that this order was needed to address concerns about national security issues and Executive privilege with respect to Presidential papers, this is simply not true. The fact is that all such matters are more than adequately addressed in the Presidential Records Act. The professional staff of

the National Archives has long experience working with sensitive records and is well qualified to manage these things in a thoroughly professional and independent manner. I dare say there are members of the National Archives staff that have higher security clearances than most of the people in the White House.

The casual assumptions that underlie this Executive order are profoundly contrary to fundamental archival principles and responsibilities, and they could imperil the evidentiary values that are at the heart of our work. More important, the accuracy of the documentary record is at the core of good government, and more generally, at the heart of the human search for truth.

Although Congress will certainly have a keener sense of these things than I do, I have a hard time understanding how an Executive order can be allowed to override statutory law. This is especially so in a law that is fully consistent with the requirements of both archival principle and good government, and when the order erects unnecessary obstacles to government accountability for the people.

We therefore respectfully urge Congress to take appropriate action and overturn this dangerous and misguided Executive order.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hensen follows:]

Testimony Before the
Subcommittee on Information Policy, Census, and National Archives,
House Committee on Oversight and Government Reform

Presented by Steven L. Hensen, Past President
Society of American Archivists
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The Society of American Archivists (SAA) is the world's largest organization of professional archivists, representing 4,800 members across the United States and in more than 20 nations. Archivists are the professionals who, among other things, are entrusted by society to ensure access to the records of the people's government at all levels; to ensure the authenticity and integrity of those records; and to preserve and make accessible a credible and reasonably complete historical account of government and other aspects of society.

In accordance with these archival principles and the ethical consequences stemming from them, SAA has spoken out frequently when public officials sought to delay or deny public access to their records.

Thus it is not surprising that we would react when the records in question are those of the highest elected public office in the country—that of the President of the United States. In the wake of the 9-11 terrorist attack on the United States, President Bush issued Executive Order 13233, claiming national security concerns, among others. The national reaction to the order was swift and emphatic. A number of newspapers, magazines, and journals editorialized against it; organizations, historians, archivists, librarians, and civic activists from across the political spectrum issued statements denouncing the order; and lawsuits were filed. The House Committee on Government Reform, with broad bi-partisan sponsorship, approved legislation directed at overturning the order.

That effort was unsuccessful and the issues surrounding the Executive Order remain problematic. Recent proposals regarding the George W. Bush Presidential Library have brought these problems into even sharper relief and have once again raised public consciousness.

On behalf of the nation's archivists, I ask your consideration in overturning this six-year-old Executive Order that has seriously compromised the basic principles of government accountability which are underpinned by the people's right of access to the records of their government. In the case of the records of the office of the President of the United States, it is a right that took a long time for the nation to claim fully, but just a quick stroke of the pen to destroy.

The Presidential Records Act of 1978 (44 U.S.C. 2201-2207) came out of the ordeal of Watergate. This law addressed, among other matters, legitimate Congressional fears that former President Nixon would destroy or otherwise never allow public access to the records of his administration. Instead, the Act established the principle that presidential papers represent the

official records of activity by the executive office in our government of, by, and for the people and are the property of those people through their government. The Act supports the principle that public records are not simply a collection of historical curiosities or even the record of a personal legacy. They are instead the official evidence of government activities and the very foundation for accountable government and the rule of law. As such, they must not be subject to anything other than objective professional archival oversight. A break in the legal chain of custody or private tampering with the records can destroy inherent evidential values and affect the accuracy of future historical research. Accordingly, the Act further mandates that the Archivist of the United States be responsible for the management, custody, and access to such records on behalf of the nation as a whole.

In November 2001, President Bush signed Executive Order 13233, framed as a "further implementation" of the Presidential Records Act. In fact, however, the Order abrogates the core principles of the Act and violates both its spirit and letter. Where the PRA provides for the orderly and archivally sound management of presidential records, with the final authority residing appropriately with the Archivist of the United States, the President's order places ultimate responsibility for decisions regarding access with the President, and indeed with *any* sitting President into the future. In fact, the Executive Order gives every ex-President this power over the government records of their administrations and the records of other administrations and extends it even further—to the family members and (by implication) heirs and representatives of ex-Presidents, without apparent limit. The Order provides that the people can be denied access for any reason, or no reason, and for any period, even perpetually.

Although this unwarranted extension of presidential power and privilege to presidential family members and representatives is one of the more troubling aspects of the Executive Order, even more ominous is the violence that it does to fundamental principles of democratic access and accountability.

As noted above, archivists have a primary commitment to maintain the integrity of records, both contemporaneous and historical. We believe that access to the records of public officials is essential to the accountability and rule of law that distinguishes democracies from other forms of governance. This is as true for the county clerk as it is for the President of the United States. The existing Executive Order thoroughly undermines that accountability at its highest and most essential level.

As discussions about placement of the George W. Bush Presidential Library continue, it is time once again—and more urgently—to raise our concerns about the people's access to presidential records. There is no assurance that this library will fully and accurately reflect the record of the Bush Administration. Should the taxpayers pay to run a presidential library that is, in effect, an empty shell? There may be papers inside, but if those papers are embargoed indefinitely by Mr. Bush or members of his family, what are those papers but mockeries of public accountability? Should citizens pay to assist in undermining both the study of history and the exercise of citizens' rights?

The answer to these questions, we hope, is "no."

The ultimate responsibility lies with Congress. The House and Senate should reassert their authority, on behalf of all American citizens, to ensure that ownership and control of the records of the Bush presidency—and all presidencies—are in the hands of the National Archives in trust for the people, and not in the hands of former Presidents and their families. Reassertion of this authority would ensure that all Presidents, past and future, remain accountable.

Presidential papers are not the President's papers, but rather the records of the people's presidency. The Society of American Archivists hopes that Congress will recognize this important principle and take action to overturn Executive Order 13233.

Respectfully submitted,

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Mr. CLAY. Thank you very much for your testimony.

I also thank the entire panel for their testimony today.

Let me throw a question out to the entire panel. I would like for each of you, if you care, to take a stab at it. It seems to me that granting a former President a right to appoint a representative to assert privileges over Presidential records following his death will potentially restrict access to numerous records for an indeterminate period of time. Would anyone care to speak about the constitutional issues and practical problems that this would create?

Also, let me get your reaction on the day in November 2001 when the Executive order was issued. What was your initial reaction to it?

We will start here, Mr. Blanton, and we will just go down the table.

Mr. BLANTON. Thank you, Mr. Chairman. I will defer to my expert legal adviser here. We are co-plaintiff in this lawsuit on the constitutional and legal issues, because my expertise is the practical ones, how does it actually work. I don't think any of us has to be an expert in organizational process to understand it.

If Julie Nixon Eisenhower's kids get to exercise this privilege, we are in for a delay. It just doesn't make any sense, just from a practical point of view. At some point, the Supreme Court held that privilege erodes over time, and surely at the time it gets to the kids, it should be gone. That is just practical.

In November 2001, what I love the most, Mr. Chairman, and I put those quotes in my testimony, were the predictions made about the Executive order by the President. He said this is a fair and reasonable set of procedures; by Ari Fleischer, in the White House press room, who said that, oh, this is more information that is going to come out and it is going to come out in a more orderly process. And then before this committee of the House, by the Acting Assistant Attorney General who said that, oh, this is just a clear, sensible and workable procedure for administering the act.

Well, we had a fair, reasonable, workable, sensible, clear, orderly process producing millions of records before this Executive order, and we have not had it since. We know enough to know every one of those quotes was not true.

Thank you.

Mr. CLAY. Thank you. Thank you for that response.

Dr. Dallek, yes?

Mr. DALLEK. If I may interject, I echo Tom Blanton's comments. As someone who has worked on a number of Presidential administrations, what I know is that every one of them, regardless of their party affiliation, Democrat or Republican, they want the public to think they walk on water; that they are without error, without sin. What I find in my research is that there is always a public face and a private face. And that if the heirs to that administration, if the children, if the representatives of a Presidential administration, of a President, have control of materials, they are going to sanitize, weed out material that will make the President look less than spectacular or successful. John Quincy Adams said that the historian's principal religion is getting at the truth, speaking the truth.

I don't want to be too self-righteous and too cynical here, but my experience in 43 years of writing history about Presidents and politics, and it is quite human, people want to be seen in history as successful, as wise, as sensible, and of course, they are always less than that, but the public is well served by knowing what they were doing in the fullest possible way.

Mr. CLAY. Thank you for that response.

Dr. Nelson, go ahead.

Ms. NELSON. Let me add to that, if I may. I think that we have a lot of evidence in the papers of the Presidents, the Presidential papers that were donated to the government, because almost all of those have provisions for the heirs to examine. To finally talk about access in the long run when the President is dead, we have consistently found that the Presidential families, they vary, some more than others, but evidence is held back.

Now, there is a difference between the fact that Margaret Truman did not release the letters her father sent to her mother until her mother died, that is perhaps a matter of privacy, but it goes so much farther than that in that we have situations where families won't even give documents to the government, but will let them sit in Presidential libraries, but they are not accessioned to the government. We just have constant interference. We have that record. We know that actually exists.

Mr. CLAY. Thank you for that.

Mr. Hensen or Mr. Nelson. He will pass. OK.

Mr. NELSON. I would let Mr. Hensen go first, but I do have some answers myself.

Mr. CLAY. Go ahead, Mr. Hensen.

Mr. HENSEN. Well, I just wanted to respond to your last question as to how we felt on that fateful day. I think the others have certainly spoken to the practical aspects of this. My testimony reflects, I think, the sort of philosophical underpinnings with which we approach our work. For us, the Executive order seemed like such a breathtaking departure.

There are two sort of famous quotations that relate to our work. The first is, you shall know the truth and the truth shall set you free. And then the carving in front of the National Archives, the past is prologue. We do not learn anything from the past unless that past is reflected accurately. Everything about this Executive order threw up red flags in terms of maintaining the authenticity of the record. We have been very much involved in it ever since.

Mr. CLAY. Thank you.

Mr. Nelson, would you speak to the constitutional issue?

Mr. NELSON. Yes, being a lawyer and having my perceptions and reactions skewed by that fact, I will address your questions as a lawyer. The Presidential privilege, the Supreme Court has emphasized, is something that belongs to the executive branch, to the government. It does not belong to any individual person. Its primary custodian is the President, the incumbent President, but the Supreme Court did recognize that a former President, due to his unique relationship to the office that he held, can at least make a claim of Executive privilege, not one that is being on the sitting President or the sitting members of the executive branch, but he at least has authority to claim it.

But what authority does a private person designated as a representative by other private persons, namely the family of a deceased or incapacitated former President, have to assert this privilege that belongs to the executive branch of the U.S. Government? None at all. What expertise or knowledge does that individual have that would even serve as a basis for a rational exercise of the government's privilege? None at all.

We saw this to a limited extent when President Reagan's representative asserted privilege as to 11 documents. We don't really know anything about who this representative is or what her qualifications were, but the documents chosen appeared to be purely arbitrary. They were similar in character to the subjects of documents that had been produced. In one case, the document had actually been previously cleared for production by President Reagan's representatives several months earlier, and they simply just happened to claim privilege as to a second copy of it; and another that's subject was Nancy Reagan's use of military aircraft.

In addition to the legal and constitutional problems, and of course the problems that have been alluded to before of whitewashing reputations, there is just a question of when you assign this task to a representative who has no qualifications for it, what is the outcome going to be? At best, arbitrariness; at worst, the possibility for coverup and actions taken to protect the reputations of those that the representative has been appointed to represent.

Now, I will also respond as a lawyer to your second question, which was how did I feel when I read the order. I remember that very distinctly because the very first case that I worked on in private practice was a case called *Public Citizen* v. *Burke* where the Reagan Justice Department had issued an order that purported to direct the Archivist to defer to any claim of privilege made by former President Nixon. As one of former President Nixon's lawyers at that time, we intervened to help defend that Reagan Justice Department directive.

We lost that case. It was not only the first case I ever worked on, but one of the rare and first cases that I lost. And the D.C. Circuit said this is just ridiculous. You can't give a former officeholder the power to direct the actions of incumbent members of the executive branch. That is an abdication of the Executive's authority to take care of the laws we faithfully exercise. So when I read that order, it was deja vu all over again, and my reaction was, wait a second, I lost this case already. How could they try this again? I am still wondering that. [Laughter.]

Mr. CLAY. We will do your testimony you are preparing for another trial. [Laughter.]

Mr. DALLEK. Mr. Chairman, just a final word that when that Executive order was issued it put me in mind that what the German philosopher Hegel said, that the only thing we ever learn from history is that we never learn.

Mr. CLAY. That's right. Dr. Dallek, on that note, let me ask you, can you share with us, and I heard some of it in your testimony already, give us some examples of Presidential records of research that would not have been possible if access to privileged information had not been granted.

Mr. DALLEK. Sure. Well, we were talking earlier about Henry Kissinger's telephone transcripts. Mr. Chairman, I can assure you that they are highly revealing of a variety of things, not only about the interactions of the personalities of the President and his, first, National Security Adviser and then Secretary of State, but also on larger policy questions about Vietnam, about the Middle East. It is, I find, so timely to read these materials now because they are so revealing as to dilemmas that we continue to confront and need to address.

Now, Dr. Kissinger wanted these materials closed until 5 years after his death, and then they were supposed to be a committee that would vet the requests of people to gain access to those materials. But as Tom Blanton pointed out to me, he was part of an effort to get these materials open. I must tell you, I am very excited about bringing out this book in less than 2 months because I think it is so revelatory as to the realities that went on behind the scenes.

Again, the public face and the private face, I think it will be highly instructive to the public to see the kinds of things, and I won't enter into the expletives deleted, but they are there in the book. It is amazing the way these men would speak, the things they would say about all sorts of people, about foreign countries, about what they knew as to the limits of what they were doing in relation, for example, to Vietnam. I think there are such lessons to be seen from that in relation to the current war in Iraq.

Mr. CLAY. Thank you for that response.

Dr. Nelson, in your work with Presidential records in the past, which categories of records are the most difficult to receive? And have past Presidents, meaning those not subject to PRA, been willing to waive privileges or ownership of records containing confidential advice or appointments information?

Ms. NELSON. It is very spotty. The Johnson Library, the Johnson records, for example, have always been more available to historians than the Kennedy records. A large part depends on the families, once the President dies. But I have to say that I agree with Dr. Dallek in that when you do get the confidential records, these are really records of the staff advisers.

There are really two kinds of Presidential records. Some the President never sees, and then there are those the ones we want, that the President does see, actually works with, and where his advisers are very important to him. In most of my research, unfortunately, has been on foreign policy, so I get caught up in the security classification business, too. But when you reach those records and you see how the White House works from those records, I agree, you are seeing a totally different face.

I will give you an example, back to the Eisenhower Library. When Eisenhower was President, he told the world that he never read newspapers. He was often thought of as a man who was not very perceptive, you know, and kind of muddled his press releases. He would stand in front of the press and muddle up. When you go back and look at the documents, you will hear him say to his press officer, "Well, I don't want to directly answer that, so I will muddle it." So he knew exactly what he was doing. And furthermore, he and his secretary would discuss that he read five papers every

morning. But if he told the would he hadn't read the papers, the reporters wouldn't ask him about it.

So what you got was a totally different view of Eisenhower as President, but he was much more in control than the public knew at the time. That is the kind of insight you get to people when you get into those kinds, and where you learn those in the Eisenhower Library is from his so-called diary which was kept by his secretary. Actually he would in the evening dictate, and those were his personal thoughts and his ideas, and a lot of the memos that went back and forth.

So this definitely would be a category of confidential records that, under this Executive order, would be regarded as something to watch out for.

Mr. CLAY. That is quite insightful. Thank you.

And Mr. Hensen, are you aware of any circumstances where the reclassification of government records has caused certain Presidential records to be reclassified?

Mr. HENSEN. Well, I mean, there has certainly been a lot of things in the press lately about that. I confess my own experience has been working entirely in the private manuscript collections, and I have no personal experience in working with government records myself, so everything I know is simply sort of from a higher professional level and from working with my colleagues. But the recent attempt to reclassify documents that had been previously declassified again just struck the archival community as a breathtaking assault on the fundamental principles under which we try to operate.

Mr. CLAY. Thank you for that.

Mr. Blanton, has the administration set aside extra resources for lawyers or staff to undertake these new document review requirements?

Mr. BLANTON. It is a puzzle to me, Mr. Chairman. I have this vision of the White House counsel's office and these desks down the hallway, in the cramped east wing, just lined with boxes from the Reagan Library, just waiting for the White House counsel to go leap through them. Surely, there are better things for those folks to be doing in our national interest. It is a terrible nightmare, actually.

But there are some examples, on your previous question, from the Presidential libraries, where the reclassification can put stuff back in the toothpaste tube. I would be glad to have a couple of our expert folks at the National Security Archive, who will be glad to provide some examples to you of that kind of experience.

Mr. CLAY. We would love to see that.

Mr. BLANTON. It is the message and the psychology that the Executive order gives to the Presidential libraries that opens the door to that kind of absurd behavior. You get the psychology going in the wrong direction. When you put that on top of the normal bureaucratic imperative to cover your rear, you have problems right here in River City.

Mr. CLAY. Mr. Blanton, in your testimony you cite the sharp increase in the time it takes the Reagan Library to respond to FOIA and mandatory declassification requests. You state that since 2001, it has gone from an average of 18 months to 6½ years. Is the in-

crease primarily due to the Bush Executive order's requirement of unlimited Presidential review, or are other factors contributing to this delay?

Mr. BLANTON. I would say not primarily, Mr. Chairman, but in real significant part, which is to say the National Archives, and you already heard from Archivist Weinstein today, there is an average of direct delay caused by the Executive order of 210 days. Now, they used to say it was 90 days, and it is just going up. That is a bad track to be on. Delay is just increasing.

The message that Executive order sends adds to the further delay, because it gives that delay in the agencies. It opens room for them to delay. Then you add that all on top of the resource problems and the incoming wave of electronic records. What you have created is a crisis in the system.

But I want to go back to your previous question, because you asked about on that day, how did people feel. I was struck when I prepared for this hearing. I went back to a hearing that this committee held on November 6, 2001. One of the statements in that hearing was by one of your former colleagues, a Republican Congressman from Sacramento. He said the problem with this Executive order, this is Doug Ose, and I don't know if that is the right pronunciation of his name, but he said the problem with this Executive order is that I wouldn't have been able to investigate the gifts given to President Clinton at the end of his term. The problem with this Executive order is that it would take one of the words out of the title of this committee, and that word is "oversight."

Mr. CLAY. Thank you for that response.

Mr. Nelson, can you explain how constitutional privilege works with respect to Presidential records, and how the courts have treated the issue up to this point? You also mentioned the Reagan Executive order versus the Bush Executive order. The Reagan Executive order allowed for appeals. It is my understanding the Bush order does not. Can you try to tackle those two issues?

Mr. NELSON. Yes. To begin with, as to the Presidential privilege issues, it is really surprising in some sense how little law there is on this point, but the recognition of the Presidential Executive privilege was really first fully articulated in the Nixon tapes case in 1974, and then in a followup case called *Nixon* v. *Administrator of General Services,* which concerned the constitutionality of the Nixon Materials Act. The Supreme Court held that a former President can assert a constitutional privilege over that small subset of records that reflect his direct communications with his advisers, but that privilege is not an absolute privilege. It is a qualified privilege. It can be overcome by various public needs. The court also said that it erodes over time, and that after the passage of some years, most Presidents had recognized that even those materials that reflected their confidential communications with advisers would ultimately be made public. So it is something that gradually loses its force as the years pass after an administration leaves office.

Now, in litigation over Presidential privilege issues there have been a number of cases, the Nixon tapes cases being one, but also some cases that came out of various investigations of the Clinton administration, that concerned access to materials of a sitting

President. In those cases, the privilege is stronger than that of a former President, as a requirement in those cases of a specifically demonstrated need for access to overcome the privilege, such as the need for grand jury materials.

It is my view, though, that what the Supreme Court's opinions on the subject reflect is that with the passage of time after the departure of an administration, a more generalized public interest in access to materials of historical significant should be sufficient to overcome a claim of privilege.

So that if a former President claims privilege, it is a fundamental inversion of that principle of the privilege eroding over time to say, as this Executive order does, that the Archivist must automatically defer to that claim of privilege. Instead, what I think should happen is that there should be a determination made of whether there is something extraordinarily sensitive or significant about this particular record that would overturn the usual presumption that should apply under the Presidential Records Act that once a 12 year period specified by Congress has elapsed, the material really should no longer be subject to protection.

Now, as to the, and I am sorry, I got so caught up in my answer to the first part of the question——

Mr. CLAY. I was just curious as to how the Reagan Executive order compared with the Bush one, and was the Reagan Executive order the start of the erosion to the access, or did it go that far?

Mr. NELSON. I think that the Reagan Executive order is much more balanced than the Bush Executive order because it does not grant the former President the ability, merely by making an assertion of privilege, to direct the Archivist to withhold materials. What it provides instead is that the former President has a period of time for review, a limited period. The former President could make a claim, and then the Archivist in effect, with guidance from the incumbent President, which I think in the area of Presidential privilege would have to be expected, basically would sit in judgment on that claim. If they determined that the claim was not valid, was not an appropriate claim of privilege, the material would be slated for release, and it would be up to the former President if he wanted to say, "No, I have a constitutional claim that this material must not be released." He has to go to court and back that up.

I think that is much more consistent with the design of the PRA. The draft legislation that is introduced today I think would return to that model, which seems to me to be a much more appropriate way of balancing the theoretical existence of a constitutional claim of privilege by a former President, with the PRA's mandate of access to materials as to which there is no valid claim of constitutional privilege.

Mr. CLAY. Thank you for that response.

Before we adjourn, I will allow any witness on this panel to make concluding remarks in regard to the PRA.

Dr. Dallek.

Mr. DALLEK. Can I be excused? I have an appointment I must meet.

Mr. CLAY. You certainly may. We were just about to adjourn. You may be excused. Thank you for your attendance today.

Mr. DALLEK. Thank you.

Mr. CLAY. Mr. Hensen.

Mr. HENSEN. Mr. Chairman, I would just like to, since it has not come up, to give my recollection, in the course of these hearings. I just wanted to point out that the whole issue of the Executive order is particularly interesting right now in connection with the debates going on at Southern Methodist University and the proposed Bush Library there. As a member of the staff of Duke University, where there was debate took place 30 or 40 years with respect to President Nixon's papers, it is particularly interesting.

But I think with respect to the Executive order, we have to ask ourselves whether a Presidential library existing under this order at SMU or wherever it ends up, is the issue of what a library should be. That although there might be papers in such a library, if they are embargoed indefinitely by Mrs. Bush or Jenna or any other members of the family, what are those papers but mockeries of accountability? I just wanted to make that point.

Mr. CLAY. Thank you very much for that.

Dr. Hensen, any concluding remarks?

Ms. Nelson. And actually it often is not even family. There are one or two libraries, they have executives who are friends, who worked with the Presidents. You never know who is going to be there to make that judgment over time.

Mr. CLAY. For lack of knowledge, has George Bush, Sr., established a Presidential library yet?

Ms. NELSON. Oh, yes. It is at Texas A&M. We will now have three Presidential libraries in Texas, when George W's library is there.

Mr. HENSEN. And interestingly, President Bush tried to place the records of himself as Governor of Texas in the Presidential library, totally contrary to Texas State records law.

Mr. CLAY. Thank you for that.

Mr. Nelson, any concluding remarks?

Mr. NELSON. I think I have said plenty, but I would like to thank you, Mr. Chairman and the committee, for hearing us out today. I think this is a very important issue. It is one that all of us at this table have been working on for many years, and we are very encouraged to see this subcommittee taking it up.

Mr. CLAY. Thank you for that.

Mr. Blanton.

Mr. BLANTON. Mr. Chairman, I would just echo those remarks. This law, the Presidential Records Act, is a real flagship of American democracy. It fulfills one of the aspirations we, as Americans, have tried to rise up to over 200 years. To see it in the broken down state that it is in is a sad commentary. To turn President Kennedy's admonition on its head, he said something like, after the Bay of Pigs disaster, he said, "You know, victory has 100 parents, but defeat is an orphan."

Well, there are a lot of people that sort of would want to say we are at fault for this crisis in this defeat of the Presidential Records Act, but I think this subcommittee is taking a big step forward, a small step for the subcommittee, giantly for the Presidential Records Act.

Thank you.

Mr. CLAY. Thank you for that.

I thank the entire panel for their testimony today. It is apparent that it is a testament from the witnesses on this panel and the previous panel that the Presidential Records Act is needed more than ever at this time. You will see action on that piece of legislation.

Thank you all, and this committee is adjourned.

[Whereupon, at 5:05 p.m. the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Bush's Obstruction of History

By John Wertman
Sunday, February 26, 2006; B07

At some point in the next few months, President Bush is expected to announce his choice for the location of his presidential library. Once it's open, most of the media attention is likely to focus on the public exhibits, which will no doubt extol the president's compassionate conservatism, his leadership immediately after the terrorist attacks of Sept. 11, 2001, and his impressive selections of John Roberts and Sam Alito for the Supreme Court.

More important to history, however, are the documents that the National Archives will store in the Bush library. These records tell the real story of an administration. Some reveal heartfelt empathy and honest division about a hard decision facing a president at a given moment in time; others may prove embarrassing and show nothing but the basest of political motivations. But for better or for worse, these records belong to the American people and should be available so that future generations can learn from the triumphs and failures of our past leaders.

It was chiefly for this reason that Congress passed the Presidential Records Act in 1978. The law was intended to ensure that after a period of no more than 12 years, presidential records, other than those dealing with existing national security matters and a few other exempted categories, would be made available to the public forever. Thus the law serves as the final check on indiscretion in office and the final basis for presidential accountability.

The law's presumption of public access held firm for more than two decades, but in 2001 President Bush used post-Sept. 11 security measures as a reason to issue an executive order that turns the law on its head. Bush's decree allows former presidents and their heirs to bar the release of documents for almost any reason. It flies in the face of congressional intent and forces our nation's leading historians to take legal action if they want to gain access to documents.

The executive order, No. 13233, drew quite a bit of attention when it was first issued. A group led by the watchdog organization Public Citizen challenged the order's legality in federal court, but the case has been plagued by procedural delays and is still pending. A handful of bills were introduced in Congress that would have overturned the order, but none made it farther than committee.

Unfortunately, time has taken its toll on efforts to force the order's repeal, and hardly any public or political attention is being paid to the issue today, even though it represents a wholesale change in the way the federal government preserves and promotes our national public memory. Sen. Susan Collins (R-Maine) and Fairfax County's Rep. Tom Davis (R), who chair the committees with jurisdiction over presidential records, have been approached numerous times by historians, scholars and public interest groups regarding

the order, but they have failed to act. They should look to the commendable example of Louisiana Gov. Kathleen Babineaux Blanco (D), who recently released 100,000 pages of records related to the Hurricane Katrina response. Blanco seems willing to face deserved criticism if it will help prevent officials from repeating mistakes the next time we face similar crises.

I was lucky enough to have had a chance a few years ago to ask former president Gerald Ford about the Presidential Records Act and was struck by his answer. "I firmly believe that after X period of time, presidential papers, except for the most highly sensitive documents involving our national security, should be made available to the public," he said, "and the sooner the better." He also told me that the researchers he's talked to at his presidential library have been grateful that most of his documents were made available. Ford's answer is especially telling because of the way in which he took office: He followed what he called the long national nightmare of Watergate into the White House and has a better sense than most of the importance of presidential accountability.

Until the original intent of the law is restored, public access to the records of our former presidents stands in limbo. Congress must act now to correct this injustice or one day the George W. Bush Presidential Library and Museum may be derided as a hiding place for secrets concerning matters that dogged the administration.

The writer was on President Bill Clinton's White House staff from 1999 to 2001 and is now director of public policy at the Association of American Geographers. He will answer questions from 2 to 3 p.m. tomorrow on http://washingtonpost.com.